SUPREME COURT, U.S.
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No. 98-1673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

Petitioners,

v.

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case arises from an accident to a Philippine seaman on a Norwegian flag ship while in international waters. The questions presented for review are:

1. Whether, contrary to *Carnival Cruise Lines,* and the Fifth Circuit's decision in *Marinechance*, government mandated forum selection clauses in employment contracts, otherwise valid, are made unenforceable by an individual seaman's inability to negotiate the terms of the forum selection clauses?

2. Whether U.S. law properly can be applied to a claim by a foreign seaman against a foreign shipowner for an accident in international waters contrary to specific government mandated clauses in the foreign seaman's employment contracts that require the law of the ship's flag to be applied?

3. Whether an award of damages to a foreign seaman properly can be based on the cost of medical care in the United States when the seaman has shown no legal entitlement to remain in the United States?

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Nestor Abuan, Carlos Valdez, Smedvig Tankships Limited, Smedvig Tankships (Agencies), Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., Smedvig Tankrederi, A.S., Peder Smedvig, A.S., Peder Smedvig Singapore, Pte., Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI.

K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI were limited partnerships. Shortly after the respondent's accident, Smedvig Tankships, Ltd. became the holding company for 49% of Smedvig Tankships (Agencies), Ltd., and the holding company for Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/k/a Smedvig Tankrederi A.S., and Peder Smedvig Singapore, Pte., Ltd. During the pendency of the suit, Bona Shipping A/S became the parent company of Smedvig Tankships, Ltd., through purchase.

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Petitioners herein respectfully pray that a writ of certiorari issue to review the Judgment of the Louisiana Court of Appeal, Fourth Circuit, entered in this action on June 24, 1998.

OPINIONS BELOW

The trial court's opinion is not reported. It is reproduced in Appendix B. The opinion of the Louisiana Court of Appeal, Fourth Circuit, is reported at 717 So.2d 1194 (La. App. 4th Cir., 6/24/98) and it is reproduced in Appendix A. The Louisiana Supreme Court denied petitioner's writ application on January 15, 1999. The order is unpublished and it is reproduced in Appendix C.

STATEMENT OF JURISDICTION

The order of the Supreme Court of the State of Louisiana denying review was entered on January 15, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

TREATIES, STATUTES AND REGULATIONS INVOLVED

This case arises under and presents issues of admiralty and general maritime law. In addition to a U.S. treaty, the laws and regulations of Norway and the Philippines are involved.

The relevant portions of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Norway are set forth in Appendix L. The relevant portions of the Norwegian Seaman's Act of 30 May 1975 are set forth in Appendix G. The relevant portions of the Norwegian

International Shipregister (NIS) Act are set forth in Appendix K. The relevant portions of the Philippine Overseas Employment Administration Rules and Regulations are set forth in Appendix H.

STATEMENT OF THE CASE

A. Statement of Relevant Facts

This is a maritime personal injury case brought on behalf of a Filipino seaman against a Norwegian shipowner/ employer as the result of an accident which occurred on a Norwegian flag vessel in international waters.

Respondent Carlos Valdez was graduated from the Philippine Merchant Marine Academy with a degree in marine engineering. At the time of the accident, Valdez was serving as an officer cadet on the M/V VESTRI, which was owned/ operated by petitioners.

Before joining the vessel, Valdez was required by the Philippine Overseas Employment Administration (POEA)[1] to execute an individual employment contract on a standard form used for all Filipinos obtaining work on foreign flag vessels. This included a one page POEA individual form "Contract of Employment." The contract was signed on

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1. The role and function of the Philippine Overseas Employment Administration (POEA) has been discussed in numerous cases, including *Lejano v. K.S. Bandak*, 97-0388 (La. 12/12/97), 705 So.2d 158, *reh'g denied* (La. 3/27/98), *cert. denied*, __ U.S. __ (1998); *Prado v. Sloman Neptun Schiffharts, A.G.*, 89-1208 (La. App. 4 Cir. 3/14/90), 558 So.2d 712; and *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998), *cert. denied*, __ U.S. __ (1998).

February 10, 1993, in Makati, the Philippines. The contract provided:

> 2. The terms and conditions of the revised Employment Contract for seafarers governing the employment of all Filipino seafarers approved by the POEA/Dole [Department of Labor and Employment] . . . shall be strictly and faithfully observed.
>
> . . .
>
> 4. All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established grievance machinery in the Revised Employment Contract for seafarers, the adjudication procedures of the Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order.

Appendix D.

The Revised Employment Contract for seafarers includes the following provisions:

> Section I — Jurisdiction
>
> . . . The Philippine Overseas Employment Administration (POEA) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this Contract.

Section J – Applicable Law

> . . . All rights and obligations of the parties to this Contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants wherein the Philippines is a signatory.

Appendix I.

Additionally, the POEA individual contract had the following stamped on it:

> Subject to the terms and conditions of the NIS CBA which is superior to the POEA standard contract[2]

Subsequently, on March 17, 1993, as required by Norwegian law, Valdez executed a Norwegian form individual employment agreement before a Norwegian consul. This contract provided:

> This contract is deemed a contract under Norwegian law and jurisdiction and the venue of Norwegian court. Any legal action the seaman may take against the shipowner concerning his service on board the vessel, shall as the seaman may choose, be settled either by the courts in Norway or by the courts in the Republic of the Philippines.

Appendix E.

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2. As discussed *infra*, the NIS CBA refers to the collective bargaining agreement applicable to this vessel.

The contract also stated:

> Wages, overtime pay and other conditions according to collective agreement between ASO and AMOSUP

The standard Norwegian International Shipregister Collective Bargaining Agreement (NIS CBA), negotiated between the Norwegian Shipping and Offshore Federation (ASO) and the Associated Marine Officers and Seaman's Union of the Philippines (AMOSUP), was adopted by petitioners on behalf of the owners of four NIS flagged vessels, including the VESTRI. The NIS collective bargaining agreement provided for the application of Norwegian law and also provided, as required by Norwegian law, that all cases arising out of the employment relationship were to be brought either in Norway or in the Philippines:

> The Unions and the ASO have observed that according to the NIS Act this agreement should be subjected to Norwegian law and the jurisdiction of the courts in Norway. Cases concerning the officer's service on the ship may be brought against the company before a Norwegian court or before a court in the officer's country of residence.

Appendix J.

In summary, Valdez signed two individual employment contracts, both of which specified that any claims were to be brought either in the Philippines or in Norway. Both incorporated by reference more comprehensive master agreements that also had forum selection clauses requiring exclusive jurisdiction of all disputes either in Norway or in

the Philippines. The POEA individual contract is a document required for service by Filipino seamen aboard foreign flag ships. The Norwegian individual contract, inclusive of its forum selection and choice of law clauses, is mandated by Norwegian law.

Valdez's employment began on March 23, 1993, with his departure from the Philippines. On May 26, 1993, VESTRI was in international waters between Cuba and the United States when a ship's crane failed, resulting in a fracture to his leg. Because of the severity of his injury, Valdez was flown by helicopter to Key West, Florida, where he was allowed temporary parole because of his emergency medical situation. After admission to a hospital, Valdez suffered a stroke, which resulted in significant impairment. After the critical stage of care had passed, Valdez received additional treatment and rehabilitative care at various hospitals in the Miami area. By December 1993, he had progressed very well. His rehabilitation team decided there was no further need for inpatient therapy and arrangements were made for his discharge to the Philippines. However, he remained in Florida instead of returning home to the Philippines. According to all witnesses, Valdez had reached maximum medical cure before trial and he was fully capable of traveling to the Philippines.

Two months after his suit was filed in Louisiana, Valdez, his parole status unchanged, moved to New Orleans.

B. The Proceedings Below

In August 1994, the VENITA, a sister ship of the VESTRI, came into the Mississippi River and was attached by respondent in a Louisiana state court pursuant to a

nonresident writ. Petitioners filed various exceptions and requested enforcement of the forum selection and choice of law provisions contained in the employment contracts. The trial court refused to enforce the forum selection clauses and held U.S. law was applicable. Petitioners' application for an interlocutory supervisory writ was denied by the Louisiana Court of Appeal, Fourth Circuit.

The case was tried to the court, sitting without a jury, in September 1995. On January 31, 1996, the trial court rendered judgment. Finding there was no negligence, but that the vessel was unseaworthy, the court awarded over $5,000,000 in damages. The majority of the award was premised on the cost of future medical care in the United States rather than the Philippines, even though there was no showing that this Philippine seaman was entitled to remain in this country.

Petitioners appealed to the Louisiana Court of Appeal, Fourth Circuit, which affirmed the trial court on June 24, 1998, with two dissenting opinions. Petitioners' motion for rehearing was denied on September 15, 1998. Thereafter, petitioners sought review by the Louisiana Supreme Court, which denied the application by a 4-3 vote on January 15, 1999.

HOW THE FEDERAL QUESTIONS PRESENTED WERE RAISED AND PASSED UPON IN THE STATE COURTS

The issues regarding the forum selection and the choice of law clauses were raised in the trial court in pretrial hearings directed to the issues. The trial court denied enforcement of the forum selection clauses and held that U.S. law would

apply. Petitioners' applied to the Court of Appeal for an interlocutory supervisory writ. The Louisiana Court of Appeal, Fourth Circuit, denied the request for interlocutory supervisory review of the issues.

The case went to trial on the merits and petitioners again raised the issue of the forum selection and choice of law clauses. The trial court again refused enforcement of the forum selection clauses and applied U.S. law to the claim. At the trial on the merits, petitioners also raised the issue of the appropriate standard for cost of future medical care. The trial court held that medical care would be based upon the cost of providing such care in the United States.

After Judgment was entered in the trial court, all three issues were raised in the Louisiana Court of Appeal. The Court of Appeal ruled adversely to petitioners. Supervisory review was sought from the Louisiana Supreme Court with respect to all three issues. The Louisiana Supreme Court denied petitioners' application for a writ.

REASONS FOR GRANTING THE WRIT

I.

THE LOUISIANA COURT OF APPEAL ERRED IN REFUSING TO ENFORCE STANDARD FORUM SELECTION CLAUSES IN THE EMPLOYMENT CONTRACTS OF A FILIPINO SEAMAN, IMPROPERLY BASING ITS ANALYSIS ON THE SEAMAN'S SAILING EXPERIENCE AND UNION MEMBERSHIP STATUS. THE APPELLATE COURT'S DECISION IS CONTRARY TO THE HOLDING OF THIS COURT IN *CARNIVAL CRUISE LINES*, AND IS IN UTTER AND COMPLETE CONTRADICTION TO THE ENFORCEMENT OF THE POEA FORUM SELECTION CLAUSE BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *MARINECHANCE*. BY IMPROPERLY FOCUSING ITS ANALYSIS ON THE INDIVIDUAL CIRCUMSTANCES OF THE PARTICULAR SEAMAN, RATHER THAN LIMITING ITS CONSIDERATION TO THE FUNDAMENTAL FAIRNESS OF THE CLAUSE, THE LOUISIANA COURT OF APPEALS HAS CRIPPLED THE EFFECTIVENESS OF FORUM SELECTION CLAUSES, LEADING TO UNPREDICTABLE RESULTS AND INCREASED LITIGATION.

The decision of the Louisiana Court of Appeal refusing enforcement of the forum selection clause in Valdez's contracts was rendered six months after the Louisiana Supreme Court enforced the same forum selection clause in the case of another Filipino crewmember on a Norwegian vessel, *Lejano v. K.S. Bandak*, 97-0388 (La. 12/12/97), 705 So.2d 158, *reh'g denied*, (La. 3/27/98), *cert. denied*, __ U.S.

__ (1998), and two days before the United States Court of Appeals for the Fifth Circuit enforced a nearly identical forum selection clause in the case of two other Filipino seamen serving on a Cypriot vessel. *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998), *cert. denied*, __ U.S. __ (1998). The contradictory outcome in this case resulted from the erroneous approach taken by the Louisiana Court of Appeal. Ignoring the precedents set by this Court and others for analysis of forum selection clauses in admiralty, the court addressed the seaman's individual circumstances rather than looking to the validity of the forum selection clause itself.

The Norwegian individual employment contract signed by Valdez had a forum selection clause that gave him the option of taking legal action against the shipowner in Norway, the shipowner's domicile, or in the Philippines, the seaman's home country. A more reasonable forum selection clause can hardly be imagined. The forum selection clause was required by Norwegian law and its inclusion in the seaman's individual contract of employment was mandated regardless of the seaman's union membership.

The Louisiana appellate court noted that on the face of Valdez's employment contract, in addition to the forum selection clause, a union collective bargaining agreement was incorporated by reference. Because the court found Valdez was not a member of the union, it refused to bind him to the collective bargaining agreement. However, Valdez's relationship to the union should have had no bearing on the enforceability of the forum selection clause that was included on the face of Valdez's Norwegian individual contract.

Similarly, the court refused to enforce the POEA form individual employment contract, which was required by his

home country, signed by Valdez, included a forum selection clause mandating all disputes be resolved in the Philippines, and incorporated a union collective bargaining agreement by reference.

The court's concern with the collective bargaining agreement not only has no bearing on the issue of fundamental fairness of the forum selection clauses, but the incorporation of the collective bargaining agreement should make no difference to the outcome in any event. The jurisdictional clauses of the incorporated collective bargaining agreement and the Revised Employment Contract specify the very same fora as required in the individual employment contracts — Norway or the Philippines.

In relying on the plaintiff's individual circumstances instead of directing its analysis to whether each forum selection clause, in and of itself, was fundamentally fair, the Louisiana Court of Appeal failed to follow this Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

In *Carnival Cruise Lines*, this Court expressly rejected the theory that a forum selection clause is unenforceable in admiralty because it was not negotiated by the parties. Even though the cruise line afforded the passenger no opportunity for input into the terms and conditions of her ticket, this Court held the forum selection clause in the ticket was enforceable provided it was fundamentally fair.

> [W]e do not accept the Court of Appeals' determination that a non-negotiated forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.

The United States Court of Appeals for the Fifth Circuit addressed the identical issue in the context of two Philippine seamen injured in an accident on a Cypriot flag ship in the Mississippi River in *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998), *cert. denied*, __ U.S. __ (1998). The seamen had signed standard POEA contracts with forum selection clauses almost identical to the ones signed in this case by Valdez. Holding that a forum selection clause which is "fundamentally fair" is enforceable, Judge Wisdom wrote:

> The contracts of employment for seamen aboard international vessels are routine; the seaman individually do not have much bargaining power. The selection of a forum in advance reduces the vessel owner's exposure to suits in forums all over the world. Furthermore, it informs the seamen of where their causes of action can be maintained. Where this case departs from *Carnival Cruise Lines* is that the forum selection clause was imposed by an arm of the Philippine government rather than by either party. This distinction does not alter the fact that the forum selection clause is fundamentally fair. We find, then, that the forum selection clauses in the seamen's contracts are enforceable.

Marinechance, *supra*, at p. 221.

In *Afram Carriers v. Moeykens*, 145 F.3d 298, 301 (5th Cir. 1998), the Fifth Circuit held the inquiry must be directed to the clause itself and not to the contract in general:

> The burden of proving unreasonableness [of a forum selection clause] is a heavy one, carried only

> by a showing that *the clause* results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court.

The Louisiana Court of Appeal did not direct its inquiry to the fundamental fairness of the forum selection clauses. The clauses themselves were required by the interested governments and there was no suggestion of fraud. The fact the court found Valdez was not a union member or a veteran seaman does not suggest a case of overreaching. The clauses violated no public policy, and the enforcement of the clauses did not deprive plaintiff of his day in court. Respondents' experts acknowledged that Philippine law and Norwegian law provided remedies to Valdez. Thus, there was no evidence that the clauses themselves were fundamentally unfair.

Instead, improperly conducting its analysis by focusing on the particular factual circumstances of the individual seaman, the Louisiana Court of Appeal held:

> [T]he record contains evidence that clearly distinguishes Mr. Valdez' situation from that of Mr. Lejano. Mr. Valdez, unlike Mr. Lejano, was not a member of (AMOSUP), the Philippine union that was a party to the collective bargaining agreement (hereafter CBA) from which the POEA contract was derived. He was not a veteran seaman. In fact, he had never been to sea before he joined the Vestri in Philadelphia where he executed the shipping articles, his contract of employment with the ship. The CBA between Peder Smedvig Singapore PTE, Ltd. and AMOSUP provides that it will be applicable to Filipino officers who are

> members of the Union. Mr. Valdez was not an officer, he was a cadet. The CBA provides that cadets are excluded from paying union dues. Unlike the officers to whom the CBA was applicable a cadet received a stipend rather than the compensation paid a regular salaried crewmember. Mr. Valdez was required to execute an affidavit in Manila attesting to his understanding of this difference between the compensation paid him and regular crew members. Attached to the CBA is an appendix which lists the AMOSUP members in the Vestri crew; Carlos Valdez' name does not appear on that list. Mr. Valdez testified that he had no knowledge of any collective bargaining agreement.
>
> These distinctions are material in light of the Supreme Court's reason for enforcing the POEA contract against Mr. Lejano, who was a member of AMOSUP, and who derived the benefits and advantages of other provisions of the union's collective bargaining agreement. . . . Because Carlos Valdez has shown that enforcement of this provision against him, who was not a member of AMOSUP, who was not aware of the CBA, and who did not receive the compensation paid regular crewmember would be overreaching, unreasonable and unjust, the trial court correctly found that the forum selection clause was not enforceable under federal law.

Appendix A, pp. 7a-8a.

The Louisiana Court of Appeal decision in this case cannot be reconciled with *Carnival Cruise Lines* or *Marinechance*.

The idea of a "case by case" analysis of the burden on plaintiffs who seek to avoid standard forum selection clauses was again rejected by this Court when it considered such clauses in light of the Carriage of Goods by Sea Act:

> It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 536 (1995).

The purpose of a forum selection clause is to give certainty and to prevent expensive litigation over the appropriate forum.

> Forum selection clauses are important in international cases such as the instant case because there is much uncertainty regarding the resolution of disputes. Ocean-going vessels travel through many jurisdictions, and could become subject to the laws of a particular jurisdiction based solely upon the fortuitous event of an accident. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.

Marinechance, supra, at p. 220.

Requiring an analysis of the individual circumstances of each person seeking to avoid application of a forum selection clause undermines their very purpose. Such an analysis destroys the predictability of forum selection clauses and promotes protracted and expensive litigation over the choice of forum. In Louisiana state courts, the standard POEA forum selection clauses in seamen's individual contracts are now being regularly challenged, with varying results. Forum selection clauses involving seamen from countries other than the Philippines are also being challenged.

The ruling by the Louisiana Court of Appeal is in direct conflict with *Carnival Cruise Lines* and cannot be reconciled with the Fifth Circuit's decision in *Marinechance*. The "savings to suitors" grant of alternative jurisdiction is not a license to the state courts to set off on their own course in matters of admiralty and maritime law. A writ should be granted.

II.

THE LOUISIANA COURT OF APPEAL ERRONEOUSLY APPLIED UNITED STATES LAW TO THE CLAIM OF A PHILIPPINE SEAMAN AGAINST A NORWEGIAN SHIPOWNER FOR AN ACCIDENT IN INTERNATIONAL WATERS, NEGATING A SPECIFIC, GOVERNMENT MANDATED CLAUSE IN THE SEAMAN'S EMPLOYMENT CONTRACT THAT REQUIRED APPLICATION OF NORWEGIAN LAW, THE LAW OF THE SHIP'S FLAG.

The motor tanker VESTRI was a Norwegian flag ship, operated from Norway and owned by Norwegians. Pursuant to Norwegian law and regulation, the Norwegian individual

contract of employment signed by Valdez was on a Norwegian Maritime Directorate form and it contained a specific clause requiring that Norwegian law apply. Despite that requirement, the Louisiana court applied United States law.

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court addressed the weight to be given to a choice-of-law clause in a seaman's employment contract:

> We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied.

Lauritzen v. Larsen, at 589.

The Louisiana Court of Appeal dismissed the significance of the law of the flag by finding the Norwegian registry was a flag of convenience. Appendix A, p. 16a. The Norwegian International Shipregister is not a flag of convenience because it requires a substantial connection of the shipowning interest with Norway to fly the Norwegian flag. *NIS Act*, § 1, Appendix K, pp. 118a-119a. Even were it a flag of convenience, the courts of this country are required by treaty to consider Norwegian flag vessels as vessels of Norway, without exception:

Article X

> Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Article X, Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, U.S. — Norway. Appendix L, p. 121a.

The same considerations used in reviewing forum selection clauses are to be applied in evaluating enforcement of a choice of law clause. *Haynesworth v. the Corporation*, 121 F.3d 956 (5th Cir. 1997), *cert. denied*, __U.S. __ (1998). The Court looks to the clause itself. In this case, there is no evidence that the choice of law clause in the seaman's contract, required by Norwegian law, was the product of fraud, overreaching, or fundamental unfairness. It is undisputed that the law of Norway provides a remedy to seamen, although its extent, especially with regard to a recovery for unseaworthiness, was disputed in this case. The law of Norway permits a seaman on a Norwegian ship to bring suit against the shipowner, but only in Norway, or in the country of the seaman's residence, or before a Norwegian consul. *Norwegian Seaman's Act*, § 50, Appendix G, p. 112a; *NIS Act*, § 6, Appendix K, pp. 119a-120a. One of the reasons for the passage of that forum provision in Norwegian law was to prevent forum shopping, particularly with respect to suits in the United States.

Historically, United States federal courts have not been hesitant to dismiss cases after finding Norwegian law applies. *Lockwood v. M/S ROYAL VIKING STAR*, 663 F. Supp. 181 (C.D. Ca. 1986), *aff'd*, 820 F.2d 1227 (9th Cir. 1987); *Tarasenko v. Cardigan Shipping Co., Ltd.*, 671 F. Supp. 997 (S.D.N.Y. 1987). *Tjonaman v. A/S Glittre*, 340 F.2d 290 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965); *Nakken v. Fearnley & Eger*, 137 F. Supp. 288 (S.D.N.Y. 1955); *Pettersen v. The Bertha Brovig*, 92 F. Supp. 895 (S.D.N.Y. 1950); *The Lynghaug*, 42 F. Supp. 713 (E.D. Pa. 1941); *The Astra*, 34 F. Supp. 152, 154 (D. Md. 1940).

Great care and reserve should be exercised when extending our notions of jurisdiction into the international field. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114 (1987). This is especially true in connection with the internal affairs of a foreign flag ship, where such an intrusion raises "considerable disturbance not only in the field of maritime law, but in our international relations as well." *McCulloch v. Marineros de Honduras*, 372 U.S. 10, 19 (1963). To apply U.S. law to this case when the countries truly involved (Norway and the Philippines) have a system of laws and contracts, governmentally approved and/or mandated, that specify Norwegian law for this dispute, is so contrary to the expectations of the parties and governments involved that it violates fundamental notions of fair play and international comity. "[T]he choice of law of a State which has had no significant contact or significant aggregation of contacts . . . with the parties and the occurrence" is fundamentally unfair. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

The argument that a vessel with frequent voyages to the United States should forfeit its right to have the law of its

flag applied to its internal affairs has been raised a number of times over the years, and has been rejected:

> Respondent [seaman] places great stress upon the assertion that petitioner's [shipowner's] commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

Lauritzen v. Larsen, *supra*, at 581.

During the period from the purchase of VESTRI in 1989 through the time of this accident, neither her owners nor her managers had any offices, bank accounts, agents for service of process, regular employees or subsidiaries located in the United States. When the vessel called in the United States, it was at the direction of her charterers, who had the freedom to arrange for the call of the vessel at any suitable port, subject to the terms and provisions of various charter agreements. The charter in effect at the time of the accident was for a voyage that began in Mexico and concluded, at the charterer's option, either in United States or Caribbean ports. It was solely the decision of the charterer and not the shipowner as to whether the vessel would enter United States waters. Affidavit of Per Gustav Blom, Appendix F, p. 107a.

The fact petitioners' customer at the time of the accident was a United States entity is not a justification for interjecting

U.S. law into the internal affairs of a Norwegian flag ship in direct contradiction to the choice of law clauses in the seaman's contract of employment. The Louisiana courts should not have interfered with Norway's decision to subject seamen on Norwegian vessels to Norwegian law, a decision approved by the government of the seaman. The frustration of the choice of law clauses by the Louisiana court was error.

III.

THE LOUISIANA COURT OF APPEAL ERRONEOUSLY AFFIRMED AN AWARD FOR THE EXPENSE OF LONG TERM MEDICAL CARE BASED UPON UNITED STATES COSTS WHEN THE ALIEN PLAINTIFF FAILED TO DEMONSTRATE A LEGAL RIGHT TO REMAIN IN THE UNITED STATES.

The court awarded respondent $3,000,000 as future medical expenses for his life expectancy based upon the alleged cost of future care in the United States. However, Valdez is not a citizen of the United States. Rather, he was temporarily paroled into the United States for emergency medical treatment pursuant to the provisions of 8 U.S.C. § 1182(d)(5)(A), which specifies that such parole "shall not be regarded as an admission of the alien . . .". Thus, respondent is not "admitted" to the United States in any capacity, either temporarily or permanently. Further, he cannot even seek resident alien status without first leaving the United States.

Against these facts, the issue is whether a citizen of a foreign country is entitled to recover damages based upon the cost of future medical care in the United States when he has no established right to remain here. The answer to this question is "no".

While this Court has not addressed the issue of an alien's burden of proof in a medical damages case, it has addressed the issue on at least two occasions in "back wages" cases. In *Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883 (1984), the Court concluded that aliens who had not shown their entitlement to live in the United States permanently were unable to collect "back pay" damages in an employment discrimination case:

> Similarly, in computing back pay, the employees must be deemed "unavailable" for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

Sure-Tan, at p. 903.

In *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court cited *Sure-Tan* with approval, and applied its holding prospectively to deny future damages to aliens who had not proven their entitlement to live permanently in the United States:

> [W]hile [the plaintiff] maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief — re-instatement and continued employment — that probably would be granted to other victims of similar unfair labor practices.

Lopez-Mendoza, at 1048, n.4.

Stated succinctly, a plaintiff carries the burden of proving lawful entitlement to be present in the United States for all

periods for which damages are sought. As stated by the Seventh Circuit Court of Appeal:

> We do not find it problematic to require employees seeking a back pay award to come forward with documents establishing their lawful entitlement to be present in the United States.

Del Rey Tortilleria, Inc. v. National Labor Relations Board, 976 F.2d 1115, 1123 (7th Cir. 1992).

If a Philippine tourist were injured in the United States, his long term medical care costs would be calculated at the rate of such care in the Philippines. For the same reason, Valdez, who has no more right to remain permanently than a tourist, and who was not even injured in the United States, should have his medical expense award based upon the cost of care in the Philippines, not the United States.

The Louisiana Court of Appeal erroneously relied on two United States Fifth Circuit cases in which the aliens demonstrated to the court a legal right to remain in the United States. Those cases are inapposite because Valdez did not demonstrate to the court any legal entitlement to remain in the United States.

In summary, the law requires a plaintiff to prove entitlement to permanent resident alien status in order to recover long term future medical expenses at Unites States rates. Valdez failed. The proper award should have been based on the cost of future medical care in his home country, the Philippines.

CONCLUSION

A Norwegian shipowner hired a Philippine seaman to work on a Norwegian flag ship. Before he ever left the Philippines, the seaman signed two individual contracts, each containing a forum selection clause on its face requiring suit to be brought either in Norway or in the Philippines. Such clauses are required by Norwegian law and approved by the Philippine government. Although the forum selection clauses were fundamentally fair, the Louisiana Court of Appeal erred by focusing on the individual seaman's circumstances, particularly his lack of union membership and inexperience at sea. The analysis was contrary to this court's decision in *Carnival Cruise Lines*, contrary to the Fifth Circuit's holding in *Marinechance*, and produces precisely the type of inconsistency and expensive litigation that forum selection clauses are designed to avoid.

The Louisiana Court of Appeal's parochial attitude extended to the law applied to the claim. Although the accident happened on a Norwegian flag vessel in international waters, the court applied U.S. law to the claim. The application of U.S. law was in direct contradiction to the choice of law clause on the face of the seaman's contract, a choice of law clause required by Norway. The court's refusal to apply the choice of law clause was reinforced by its erroneous conclusion that the Norwegian International Shipregister was a flag of convenience and its consequent failure to respect the United States — Norway treaty that requires all vessels flying the Norwegian flag be deemed vessels of Norway.

The Louisiana Court of Appeal further erred by allowing an award of damages to stand when it was based in large part

on the cost of future medical care in the United States. There was no evidence at trial that this Philippine seaman was entitled to remain in the United States and consequently the award of damages should have been based upon the cost of care in the seaman's home country.

For the above reasons, petitioners request that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND REASONS FOR JUDGMENT OF THE COURT OF APPEAL FOR THE FOURTH CIRCUIT, STATE OF LOUISIANA DATED JUNE 24, 1998

No. 96-CA-1013

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.

AN APPEAL FROM THE
25th JUDICIAL DISTRICT COURT,
PLAQUEMINES PARISH
NO. 38-719, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

PATRICIA RIVET MURRAY
JUDGE

(Court composed of Chief Judge Patrick M. Schott, Judge Denis A. Barry, Judge Robert J. Klees, Judge Moon Landrieu and Judge Patricia Rivet Murray)

Appendix A

SCHOTT, C.J., DISSENTS FOR THE REASONS ASSIGNED BY KLEES, J., AND FOR THE FOLLOWING REASONS.

KLEES, J., DISSENTS.

* * *

AFFIRMED IN PART; REVERSED IN PART

The defendants, Smedvig Tankships, Ltd., Smedvig Tankships (Agencies), Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/d/a Smedvig Tankrederi A.S., Peder Smedvig, A.S., Peder Smedvig Singapore, Ptd., Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI, (hereafter referred to as the Smedvig group) appeal a judgment in favor of plaintiff, Carlos Valdez[1], in the amount of $5,042,563.00, plus costs and interest. We reverse in part and affirm in part.

Carlos Valdez signed on board the M/T Vestri on March 27, 1993, at Philadelphia, Pennsylvania. Mr. Valdez, who was hired as an engine room cadet, was injured on May 26, 1993, when the engine room crane collapsed and a piston fell on him. This incident occurred in international waters approximately 84 miles off the coast of Florida while the Vestri was on a voyage between Houston, Texas and Philadelphia, Pennsylvania. Mr. Valdez was flown to a

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1. Nestor Abuan, who brought this suit on behalf of Carlos Valdez, is Mr. Valdez' curator by virtue of guardianship proceedings in Florida.

hospital in Key West, Florida where he was diagnosed with multiple significant traumas, and two serious leg fractures. On May 27, 1993, Mr. Valdez fell into a coma, lasting nearly a month, which was caused by a fat embolism related to the fractures he sustained while on the Vestri. He was hospitalized until July 2, 1993, when he was transferred to a rehabilitation hospital and ultimately to a community re-entry center. Mr. Valdez was discharged from the latter facility, and lived with friends in Miami until being admitted to the Rehabilitation Living Center in New Orleans.

On August 22, 1994, this action was brought on Mr. Valdez' behalf in the district court in Plaquemines Parish, pursuant to the "Savings-to-Suitors" clause, 28 U.S.C. 1333. The plaintiff asserted jurisdiction over the defendants by virtue of an *in rem* arrest or attachment of a vessel owned by the defendants while it was physically located in Plaquemines Parish.[2] The petition sought relief under the Jones Act, the General Maritime Law, and alternatively under the law of either the Philippines or Norway, which Mr. Valdez alleged to be the same as that of the United States.

The defendants filed declinatory and peremptory exceptions and a motion to dismiss based on a forum selection clause in Mr. Valdez' contract of employment with the agent for Peder Smedvig Singapore PTE, Ltd. (hereafter referred to as the overseas employment contract). The exceptions and motion were denied. Defendants appealed the trial court's

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2. The seized vessel was released upon the defendants providing a "Letter of Undertaking" in the amount of $10,000,000, guaranteeing payment of any judgment rendered against them in favor of Mr. Valdez.

refusal to enforce the forum selection clause, and Mr. Valdez moved to dismiss that appeal. This court denied the motion, but converted the appeal to an application for supervisory writ when the Supreme Court ruled that it was error to have denied the dismissal. The trial, which had been rescheduled for its original setting after the defendants' appeal was dismissed, was stayed by this court pending its consideration of the writ application. The writ application was denied, with one dissent.[3]

Following a three day bench trial in September, the trial court entered judgment in favor of Mr. Valdez, and assigned reasons for that judgment. The defendants timely appealed, arguing that the trial court erred by refusing to enforce the forum selection clause and by its application of United States law to Mr. Valdez' claims. The defendants also argued that the damages awarded were excessive and erroneous as a matter of law. The appeal was argued, and then reargued before a 5-judge panel in accordance with LSA-Const. Art. 5, § 8B. The parties were allowed to file supplemental briefs following the reargument. In addition, the parties requested and were granted leave to brief the applicability of the Supreme Court's decision in *Lejano v. K.S. Bandak*, 97-0388 (La. 12/12/97), 705 So.2d 158, to this case.

THE FORUM SELECTION CLAUSE:

There is no question that the district court had jurisdiction of Mr. Valdez' claim. The question raised by defendants in

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3. *Abuan v. Smedvig Tankships, Ltd.*, 95-0629 (La.App. 4 Cir. 7/28/95).

their first assignment of error is whether the court should have declined to exercise that jurisdiction and require Mr. Valdez to bring his claim in the Philippines or Norway as provided in the overseas employment contract. The district court found that the forum selection clause contained in the overseas employment contract was not enforceable against Mr. Valdez under the law of the United States, the Philippines, or Norway. The Smedvig group contends that the provisions of this contract, which incorporates the terms and conditions of the "standard employment contract governing the employment of all Filipino seamen on board ocean-going vessels" approved by the Philippine Overseas Employment Administration (POEA), should be enforced.

In *Lejano, supra*, the Supreme Court considered the enforceability of a forum selection provision that is indistinguishable from the one at issue here. Mr. Lejano was a Philippine seaman who had been seriously injured in international waters on board a vessel owned by a Norwegian corporation. He was treated for an extended period of time in Miami and then repatriated to the Philippines. The trial court had ruled that the forum selection clause in Mr. Lejano's overseas employment contract was enforceable and ordered him to file suit in the Philippines or Norway; and the appellate court denied writs. *Lejano v. Bandak*, 95-1011 (La.App. 5 Cir. 1/15/97), 688 So.2d 86. Citing conflicting decisions of the state appellate courts, Mr. Lejano petitioned the Supreme Court to grant *certiorari* in order provide guidance to the lower courts on the issue of forum selection clauses and maritime tort suits. The Court granted the writ. *Lejano v. Bandak*, 97-0388 (La. 4/4/97), 692 So.2d 407.

In his brief on the merits, Mr. Lejano argued that a state court considering an action brought pursuant to the Savings to Suitor's clause must apply federal **substantive** law, but was free to apply its own **procedural** law.[4] Justice Johnson, writing for the Court, rejected this argument. The Court determined that Mr. Lejano's employment contract, which was a contract for the hire of a sailor to man a ship, fell within its admiralty jurisdiction. For this reason, a Louisiana court sitting in admiralty should consider the validity and enforceability of such clauses in accordance with federal law and standards. *Lejano*, 97-0388 at p. 14, 705 So.2d at 166.

The Court then concluded that, under federal law, "[a] forum selection clause should control **absent a strong showing that it should be set aside**." *Id.* at p. 15, 705 So.2d at 167. (Emphasis added, citation omitted.) Because the forum selection clause executed by Mr. Lejano repeated the language in a collective bargaining agreement between The Norwegian Shipping and Offshore Federation ("ASO") and The Associated Marine Officers' and Seaman's Union of the Philippines ("AMOSUP"), of which Mr. Lejano was a member, the Court rejected his argument that he had no power to negotiate the terms of the agreement so that the clause should be declared invalid. Mr. Lejano's claim that he did not understand the language in which the contract was written was determined to be irrelevant in light of the "Philippine employment services' structure, the fact that the POEA [Philippine Overseas Employment Administration] acted on

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4. Because of the procedural history of the case, plaintiff also argued that the "law of the case" doctrine precluded dismissal of his claim based on the forum selection clause. That argument is not relevant to this appeal.

his behalf in negotiating and bargaining for the terms of the contract and the fact that Mr. Lejano signed the POEA-approved contract, thereby submitting to the terms thereof, and consequently, being afforded any benefits and advantages of other provisions of the contract." *Id.* at p. 18, 705 So.2d at 168.

The Smedvig group argues that *Lejano* is controlling, and requires a reversal of the trial court's decision and enforcement of the forum selection clause in this case. However, the record contains evidence that clearly distinguishes Mr. Valdez' situation from that of Mr. Lejano. Mr. Valdez, unlike Mr. Lejano, was not a member of (AMOSUP), the Philippine union that was a party to the collective bargaining agreement (hereafter CBA) from which the POEA contract was derived. He was not a veteran seaman. In fact, he had never been to sea before he joined the Vestri in Philadelphia where he executed the shipping articles, his contract of employment with the ship. The CBA between Peder Smedvig Singapore PTE, Ltd. and AMOSUP provides that it will be applicable to Filipino officers who are members of the Union. Mr. Valdez was not an officer, he was a cadet. The CBA provides that cadets are excluded from paying union dues. Unlike the officers to whom the CBA was applicable a cadet received a stipend rather than the compensation paid a regular salaried crewmember. Mr. Valdez was required to execute an affidavit in Manila attesting to his understanding of this difference between the compensation paid him and regular crew members. Attached to the CBA is an appendix which lists the AMOSUP members in the Vestri crew; Carlos Valdez' name does not appear on that list. Mr. Valdez testified that he had no knowledge of any collective bargaining agreement.

These distinctions are material in light of the Supreme Court's reason for enforcing the POEA contract against Mr. Lejano, who was a member of AMOSUP, and who derived the benefits and advantages of other provisions of the union's collective bargaining agreement. As the Supreme Court noted in *Lejano*, ". . . . according to *The Bremen*, a forum selection clause should be enforced **absent a clear showing that enforcement would be unreasonable and unjust,** or that the clause is invalid for such reasons as fraud or overreaching. (emphasis added; citation omitted)." *Id.* at p. 15, 705 So.2d at 167. The Court determined that the forum selection clause should be enforced as to Mr. Lejano because he was unable to make a clear showing that to do so would be unreasonable, unjust, fraudulent or overreaching. Because Carlos Valdez has shown that enforcement of this provision against him, who was not a member of AMOSUP, who was not aware of the CBA, and who did not receive the compensation paid regular crewmembers would be overreaching, unreasonable and unjust, the trial court correctly found that the forum selection clause was not enforceable under federal law.

The trial court also concluded that neither the law of Norway, nor the Philippines would enforce the forum selection clause under the facts of this case. The record evidence supports that finding.

Plaintiff and defendants introduced affidavits of experts on Philippine law. Plaintiff offered the joint affidavit of Nestor B. Alampay, Sr., a retired Justice of the Supreme Court of the Philippines, and Ruben F. Balane, Professor of Civil Law at the University of the Philippines, as well as the affidavit of an Assistant Solicitor General of the Republic of

the Philippines. Defendants offered the affidavits of Arturo Del Rosario, Jr., a lawyer in the Philippines specializing in maritime and admiralty law; Jaimie P. Gimenez, Director of the POEA; and Roy V. Seneres, Labor Attache of the Government of the Philippines for the United States.

Mr. Del Rosario's affidavit stated his opinion that the POEA has original and exclusive jurisdiction over all cases involving the employer-employee relationship, including claims for money damages, arising out of or by virtue of any law or contract involving Filipino workers for overseas employment. Mr. Gimenez stated that the POEA does exercise jurisdiction in cases of claims for injury or death of Filipino seamen aboard ocean-going vessels pursuant to standardized employment forms and collective bargaining agreements, and that the standardized contract would prevail in cases of conflict between it and the collective bargaining agreement. Mr. Seneres' affidavit was consistent with that of Mr. Gimenez. We note that none of the defense experts addressed the question of whether the overseas employment contract would be enforceable against Mr. Valdez, who was not a member of AMOSUP, and who was not paid union wages.[5]

Justice Alampay and Professor Balane, who stated that the right to seek damages before a competent court of law is

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5. Mr. Valdez has requested that this court take judicial notice of the Migrant Workers Act, Philippine Republic Act No. 8082 dated June 7, 1995, which vests exclusive jurisdiction of claims by a seaman for wages, overtime or separation pay in the National Seaman's Board, rather than the POEA, as provided in the overseas employment contract at issue herein.

a fundamental feature of the admiralty law of the Philippines, opined that the seaman's employment contract could not be interpreted to prohibit his instituting an action for damages. The joint affidavit stated that the POEA has limited itself solely to the determination of rights and obligations of the parties as provided for by the employment contract. The plaintiff's experts noted that Philippine courts have recognized that an employment contract is a contract of adhesion. Finally, the joint affidavit opined that Philippine courts recognize that agreements on venue, commonly known as "forum selection clauses," entered into between the parties to a contract cannot be used to oust a court of jurisdiction when it otherwise has jurisdiction of the case and the parties.

Mr. Edgardo Kilayko, a representative of the official counsel to the government of the Republic of the Philippines, which represents the government in any litigation, proceeding or investigation requiring the services of a lawyer, executed an affidavit attesting that the opinions of Justice Alampay and Professor Balane correctly stated the status of Philippine law.

The trial court, therefore, was presented with conflicting opinions as to the enforceability of the forum selection clause under the circumstances of this case. It chose to credit the evidence offered by plaintiff's experts. Where the testimony of expert witnesses differs, it is the responsibility of the trier of fact to determine which evidence is the most credible. *Mistich v. Volkswagen of Germany, Inc.*, 95-0939, p. 5 (La. 1/29/96), 666 So.2d 1073, 1077, *reh'g granted*, 95-0939 (La. 11/25/96), 682 So.2d 239 (original opinion reinstated). Based on the record evidence, we cannot say that the court was

manifestly erroneous when it determined that the forum selection clause would not be enforced against Mr. Valdez under Philippine law.

Similarly, plaintiff introduced the affidavit of Oystein Ore, an expert in Norwegian law. In this affidavit, Mr. Ore explained that § 50 of the Norwegian Seaman's Act provided that claims for compensation due a seaman's injury must be raised in the courts of Norway. The reason for this provision was to avoid subjecting Norwegian shipowners to suits outside of Norway, particularly in the United States. In fact, because of this provision Norwegian courts will not recognize forum selection clauses in a seaman's contract of employment. However, Mr. Ore further explained that § 50 was procedural in nature, and, therefore, binding only on Norwegian courts. Mr. Ore stated that Norway recognized forum selection and choice of law clauses in other types of contracts, but it has required that such provisions be accepted by the parties. Finally, he explained that "accepted," in the context of this case, means that the seaman must have been aware of what was agreed to and accepted the clause. Norwegian law is unlikely to consider the terms in a contract of adhesion as accepted. In considering this question, Norwegian law considers the relative bargaining position of the parties, and "may set aside a contract or any portion thereof if it is considered to be unreasonable to the basic rights of the individual."[6] The trial court's determination that Norwegian law would not enforce the forum selection clause against Mr. Valdez is supported by the record.

The Supreme Court in *Lejano* found that the forum selection clause was enforceable, and declined to make a

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6. Joint Exhibit #14, p. 3.

determination of the applicable substantive law by applying the *Lauritzen-Rhoditis* choice-of-law test. *Lejano*, 97-0388 at p. 19, 705 So.2d at 169. Because we have determined that the forum selection clause was not enforceable against Mr. Valdez, we must decide if the trial court's application of the Jones Act and the general maritime law to this claim was proper pursuant to the *Lauritzen-Rhoditis* choice-of-law test.

The first U.S. Supreme Court case to address the issue of what law governs the liability of foreign shipowners *vis a vis* a foreign seaman asserting claims in American courts was *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953). The key issue in *Lauritzen*, as stated by the Court, was whether the Jones Act of the United States should be applied to a maritime tort claim against a Danish owner by a Danish seaman who was injured on a Danish vessel while it was in Havana harbor. The seaman had signed **ship's articles** written in Danish (his native tongue) that provided that the rights of crewmembers were governed by Danish law and by the employer's contract with the Danish Seaman's Union. The Court noted that "Denmark has enacted a comprehensive code to govern the relations of her shipowners to her seagoing labor which by its terms and intentions controls this claim." *Id.* at 575, 73 S.Ct. at 924. The shipowner, **whose position was supported by the Danish government**, asserted that the Danish law supplied the full measure of the shipowners' obligation and that maritime usage and international law as accepted by the United States excluded the application of the Jones Act (an incompatible statute). The plaintiff, who conceded that Danish law applied to his claim, argued, however, that the Jones Act provided an optional cumulative remedy.

It was within this context that the Court articulated seven factors that, alone or in combination, are generally conceded to influence the choice of law to govern a maritime tort claim: 1) the place of the wrongful act; 2) the law of the flag; 3) the allegiance or domicile of the injured party; 4) the allegiance of the defendant shipowner; 5) the place of contract; 6) the inaccessibility of the foreign forum; and 7) the law of the forum. The *Lauritzen* Court considered those factors with reference to the case before it and concluded that there was an overwhelming preponderance in favor of Danish law. The Court could find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in American waters. *Id.* at 592, 73 S.Ct. at 933.

In *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 308, 90 S.Ct. 1731, *reh'g denied*, 400 U.S. 856, 91 S.Ct. 23 (1970), a case involving suit by a Greek seaman against the Greek owner of a Greek flag vessel for injuries suffered while in a U.S. port, the Court refined the *Lauritzen* test, and added the shipowner's base of operation as another important factor. Pointing out that the *Lauritzen* test is not a mechanical one, the Court stated that the significance of one or more of the factors must be considered in light of the national interest served by the Jones Act.[7] The Court then distinguished

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7. The Louisiana Supreme Court also has recognized that the *Lauritzen/Rhoditis* test is not applied mechanically. In *Powell v. McDermott International, Inc.*, 588 So.2d 84 (La. 1991), a case involving an American seaman injured off the coast of Africa, the Court noted that not all of the factors are of equal weight. *See also, Beasley v. McDermott Int'l, Inc.*, 94-1352 (La. 6/24/94), 640 So.2d 1326.

Rhoditis from *Lauritzen* on the basis of the extent of the contacts of the parties and the litigation to the United States. Emphasizing that the vessel was not a casual visitor to this country, but rather one that earned income from cargo originating or terminating in the United States, the Court saw "no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operating in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer.' " *Id.* at 310, 90 S.Ct. at 1734.

The *Lauritzen/Rhoditis* test was articulated as a means to resolve conflicts between **competing** laws by identifying and weighing the importance of contacts between states or governments whose **competing** laws are at issue. Based on the evidence in this record, it appears that the general maritime law of the United States is in accord with the maritime law of the Philippines. Former Justice Alampay and Professor Balane attested that:

> The determination and interpretation of Philippine law by a United States Court would neither conflict with the interest of the Philippine government and the uniform application of its labor statutes, the general maritime law or the Philippine Civil Code nor in any way adversely affect the interest of Philippine courts or its administrative agencies. On the contrary, it would be in the interest of the Philippine government because of the precedential value of American law and jurisprudence and the role heretofore played by United States courts in

> assuming leadership in determining maritime law issues.
>
> The courts of the Philippines frequently utilize American admiralty and maritime law jurisprudence for precedential value; for example, the doctrine of unseaworthiness as it is applied in Philippine courts in admiralty cases, has been shaped by American jurisprudence. Likewise, other maritime theories of liability are based upon American jurisprudence. (citations omitted.)[8]

In a supplemental joint affidavit, Justice Alampay and Professor Balane opined that the principles of Philippine admiralty law are virtually identical to those of the United States general maritime law. In fact, where there is some doubt about a rule or principle of Philippine admiralty law, the Philippine courts resolve the problem by relying upon the admiralty jurisprudence of nations such as the United States.[9] The experts noted that:

> [c]omparing these doctrines of liability [the duty of a shipowner/employer to provide seaman with a reasonably safe place to work] under Philippine law with the corresponding doctrines found in United States maritime jurisprudence, it becomes clear that the duties imposed upon the shipowner/ employer under either Philippine maritime law or

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8. Joint Exhibit #15, p. 11.

9. Joint Exhibit #67, p. 2-3.

United States maritime law are virtually identical.[10]

This statement of Philippine law was validated by Mr. Kilayko. The affidavits of defendants' experts on Philippine law did not refute this proposition. Because there is no conflict between Philippine and U.S. maritime law, there was no need to perform the *Lauritzen/Rhoditis* analysis *vis-a-vis* the application of Philippine law.

The trial court herein found that several of the *Lauritzen-Rhoditis* factors militated in favor of applying the Jones Act and the general maritime law of the United States to this claim. The court noted that Mr. Valdez was injured in international waters, but just off the coast of Florida, to which he was transported for treatment by a United States Coast Guard helicopter. Mr. Valdez signed shipping articles, which, under international law constitute his contract of employment with the master and the vessel,[11] in the United States. The court found that the evidence supported the conclusion that the NIS flag of the Vestri was a flag of convenience, and,

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10. Joint Exhibit #67, p. 8.

11. *See*, Thomas J. Schoenbaum, Admiralty and Maritime Law, 242 (2d ed. 1994); 1 Martin J. Norris, The Law of Seamen § 6.1 (4th ed. 1985 & 1996 Supp.); *Jose v. M/V Fir Grove*, 801 F.Supp. 358, 371 (D.Or. 1992).

Plaintiff contends that the shipping articles that Mr. Valdez executed did not contain a forum selection clause. The defendants have not produced the articles Mr. Valdez signed.

therefore, did not mandate the application of Norwegian law.[12] The trial court, like the Supreme Court in *Rhoditis, supra*, was influenced by the significant contacts between the vessel on which Mr. Valdez was injured and the United States. The court found that the M/T Vestri earned 100% of its income from voyages that began or ended in United States ports from a charter with an American company, and that the Norwegian corporation that owned the vessel was reorganized and diversified in order to allow it to profit from the United States shipping market. As the court noted:

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12. The record establishes that the M/T Vestri was sold to Smedvig Tankers Limited on May 21, 1993. Joint Exhibit #36. The evidence includes a Bill of Sale executed May 26, 1993, the day of this accident, transferring all shares of K.S. Smedvig Tankers V in the M/T Vestri to Vestri Shipping, Inc., a Liberian corporation. The affidavit of Emanuel N. Gbalazeh, Former Chief Justice of the Liberian Supreme Court, stated that Liberia adopts and incorporates the general maritime law of the United States to the extent that it does not conflict with any of the provisions of Title 22 of the Liberian Code of Laws. Justice Gbalazeh opined that the application of U.S. law to the claim for an injured seaman would create no such conflict. Joint Exhibit #37. Exhibits offered by defendants show the effective date of the transfer as May 29, 1993, the date upon which the transfer was registered. Joint Exhibit #39.

The experts in Norwegian law disagree as to whether Norway recognizes a cause of action for strict liability against a vessel owner. Defendants' expert opined that strict liability of a vessel owner is recognized only with regard to pollution damage, and that there is no cause of action for unseaworthiness. Joint Exhibit #6. Plaintiff's expert disagreed and stated that the strict liability of a shipowner has been recognized in situations where injury is due to the failure, weakness or imperfection of a vessel's technical equipment. Joint exhibit #14.

> Once again, the evidence establishes that this vessel and the corporations managing its operation were created solely for the purpose of profiting from the vessel sailing to and from American ports pursuant to a contract with an American corporation. To not subject these Defendants to the obligations codified in the Jones Act and amplified in the general maritime law of this country is to afford them an advantage over their competitors which itself violates a sense of fair play and substantial justice.

Most important to the trial court's determination was the question of whether Mr. Valdez had a means of relief in any other forum. The affidavits of plaintiff's experts on Philippine law opined that claims in tort for personal injury or death of a seaman are not covered by the POEA contract, which applies to contractual claims involving the interpretation and implementation of the CBA. *Cf. Hodge v. Ocean Quest Int'l, Ltd.*, 1992 WL 162609 (E.D.La. 1992); *Cuizon v. Kedman, Ltd.*, 1997 WL37938 (S.D.N.Y.) Plaintiff's experts also noted that Philippine courts could not compel a non-resident defendant or witness to appear before it. Nor could the POEA or the Philippine civil trial courts enforce a judgment rendered against a non-resident defendant unless the action was *in personam* and the defendant has property in the Philippines.

Defendants' experts on Philippine law disagreed with that opinion, and opined that the Philippines offered an adequate forum for Mr. Valdez' claim. Based on the record evidence we cannot say that the trial court abused its discretion when it accepted the testimony of plaintiff's experts over that of defendants' experts.

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Although the trial court did not specifically address the place of the wrongful act or the inaccessibility of the foreign forum, we note that Mr. Valdez was evacuated from the Vestri by Coast Guard helicopter and taken to a hospital in Florida, the closest place for him to receive emergency medical treatment. His initial injuries alone, although serious, would not have prevented his being repatriated to the Philippines. As a direct consequence of those injuries, however, he suffered the stroke that resulted in his residual brain damage. As a consequence he received all of his medical treatment and rehabilitation therapy in this country. All of the witnesses with regard to Mr. Valdez' condition, medical history, convalescence, and rehabilitation are in the United States.

For the above reasons we find that the trial court's determination that Mr. Valdez' claim would be governed by United States law was correct.

DAMAGES:

The district court determined that the defendants, who conceded that the failure of the engine room crane rendered the Vestri unseaworthy, were not negligent. It awarded awarded damages as follows:

General Damages	$ 1,500,000.00
Loss of Past Wages	8,592.00
Loss of Future Wages	374,747.00
Future Medical Care	3,000,000.00
Past Found	2,235.00
Future Found	136,989.00

The judgment provided that the defendants were to pay all costs, including expert fees, plus judicial interest of $ 300,000 representing interest on 20% of the general damage award from the date of the accident, and judicial interest from the date of judgment until paid on the remainder of the damages awarded.

Defendants contend that the award of damages to Mr. Valdez was excessive and erroneous as a matter of law. They have alleged three errors by the trial court in support of this contention: first, the court erred in making an award for future care or, alternatively, that the award for this element of damage was excessive because it was based on the cost of future care in the United States; second, that the award for general damages is excessive based on Mr. Valdez's injuries; and finally, that the district court erred in awarding found, or alternatively that this award is excessive.

FUTURE CARE:

Defendants argue that the trial court erred in making an award for future damages because such an award is not available under Philippine or Norwegian law. However, based on our analysis of the *Lauritzen/Rhoditis* factors, we found that the trial court's decision to apply United States law to Mr. Valdez' claim was correct.

Alternatively, the defendants contend that the award of $3,000,000 is excessive, even if such damages are available, because it is based on the cost of future care in the United States. Defendants argue that Mr. Valdez was required to establish that he was entitled to receive his medical care in

the United States, and that he failed to do so. Although Carlos Valdez has been treated in this country since he was flown here for medical treatment in May of 1993, the defendants argue that he has not established that he cannot adequately be cared for in the Philippines.

The trial court's reasons for judgment demonstrate that it carefully considered the question of what type of care Mr. Valdez would require for the rest of his life, whether that treatment could be provided on an out-patient basis, and whether it would be available to him in the Philippines. The court's reasons included a lengthy summary of the testimony of the various experts and care givers who have treated and evaluated Mr. Valdez, including the defendants' evidence and arguments in support of its argument that he should be repatriated and cared for in the Philippines.

The defendants had argued that much of Mr. Valdez' cognitive deficiencies were caused by a language barrier, which would be obviated by a return to his homeland. The court rejected this argument finding that:

> Language is not an issue. The plaintiff has established that he was taught and spoke English throughout his fourteen years of school and his deficits are not language based. That fact and the other evidence indicate that Valdez's deficits are, instead, directly related to the injuries resulting from his accident.[13]

This finding is fully supported by the record, and will not be disturbed on appeal.

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13. Reasons for Judgment, p. 29.

Appendix A

In considering the question of whether Mr. Valdez could and would receive the necessary care in the Philippines, the court noted the great discrepancy between the evaluation of his abilities by his treating physician and care givers and that of the defendants' experts, who had seen him for purposes of litigation. The court found that the evidence established that Mr. Valdez presently was "receiving exemplary medical care of a type which is essential to his well being. While the defendants have sought to establish the adequacy of medical care in the Philippines, there is no evidence that he will even receive such care if relocated."[14]

Dr. Lune-Reyes, the defendants' expert who testified on the availability and quality of rehabilitation facilities in the Philippines admitted that there are no long-term residential care facilities in the Philippines for brain-injured patients. Although Dr. Reyes opined that the care Mr. Valdez needs would be available on an out-patient basis, under her supervision, in the Philippines, she admitted that her facility focused primarily on physical rehabilitation rather than treatment of brain injury. Dr. Reyes confirmed the cultural tradition in the Philippines by which people preferred to treat family members at home rather than in facilities. Although Dr. Reyes admitted that she knew nothing about the Valdez home, she opined that he would be better cared for by his own family than in the United States.

Plaintiff's experts who considered the issue of home-care in the Philippines, did know about Mr. Valdez' home. Dr. Alcazaren testified that it had no electricity, sanitation,

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14. Reasons for Judgment, p. 30.

running water or telephone. He concluded that it would not be an appropriate setting for Mr. Valdez to receive the care he needed. Furthermore, he opined that, even if a new home were built for him, the type of home care that could be provided in the Philippines would not be compatible with the care he was receiving the United States.

The court concluded that the evidence established that:

> [T]here is a serious question as to the adequacy of the care available to Valdez in the Philippines both in terms of the type of care available and whether Valdez would even receive what may be available. There is no question that there is no type of long-term residential facility available to Valdez in the Philippines. Assuming Valdez may be adequately cared for on an out-patient basis, the evidence leaves the Court with a grave doubt that it would be administered properly.[15]

The determination of whether to calculate an award for future care on the rate of such care in the United States or in a foreign plaintiff's home country is a finding of fact that will vary from case to case. *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir.), *opinion corrected on denial of reh'g*, 848 F.2d 498 (5th Cir. 1988), *cert. denied*, *Dianella Shipping Corp. v. Hernandez* and *Hernandez v. Dianella Shipping Corp*, 488 U.S. 981, 109 S.Ct. 837 (1989). The record evidence supports this conclusion. We, therefore, cannot say that the court was manifestly erroneous when it concluded

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15. Reasons for Judgment, p. 32.

that the costs associated with Mr. Valdez' future care should be based on the cost of such care in the United States. *Cf. Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1034 (5th Cir. 1984) (award of future care based on American standards correct where district court found that plaintiff would not receive adequate care in his home country.)

Although the court acknowledged that Mr. Valdez had received considerable benefit from the care and environment at the Living Center, and agreed that his spending the rest of his life there could be characterized as an "ideal situation," the evidence did not mandate that the defendants should pay for this level of care. Instead the court determined that:

> [T]he cost of future care based on the testimony of the various witnesses as to the need for and the cost of a home where a team of professionals are available to constantly monitor the Plaintiff on a daily basis. Because of the Plaintiff's condition, as described by the various witnesses but also as observed by the Court during his testimony, the only way that Valdez can live outside of a residential facility is if he is cared for around-the-clock. The cost of his care must necessarily include twenty-four hour nursing care.[16]

The court was satisfied by the evidence presented and his own observation of Mr. Valdez that he would never be able to live on his own, and awarded $3,000,000 for future medical care associated with the cost of home care in the United States.

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16. Reasons for Judgment, pp. 34-35.

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The trial court was presented with two options for the cost of future care for Mr. Valdez. Plaintiff offered evidence that the cost of maintaining him in his current situation at the Living Center was $6,300,000. The defendants offered Dr. Burke's testimony that the cost of providing board and care management would be $2,400.00 per month or $28,800 per year. To that the court added $17,200 per year for the cost of nursing care and therapists that would be need to adequately care for Mr. Valdez and prevent his regressing and becoming depressed or suicidal, which was a genuine concern if he did not receive continued therapy. Dr. Randy Rice, plaintiff's expert economist projected the present value of future medical care based on $46,000 per year to be $2,134,400. However, the court found that the evidence did not support the proposition that the costs of therapy and round-the-clock nursing care could be provided for $17,200 per year. It, therefore, awarded $3,000,000, a figure that was between the cost for residential care at the Living Center and the cost of home care.

This court has recognized that the calculation of an award of future medical expenses need not be established with mathematical certainty. However, they must be established with some degree of certainty, and it must be shown that the expenses more probably than not will be incurred. See *Cooper v. Liberty Mutual Ins. Co.*, 96-1522, p. 11 (La.App. 4 Cir. 8/20/97), 699 So.2d 115, 120, 121. We find, therefore, that the award of $3,000,000 for future medical care for Mr. Valdez, who was 25 years of age at the time of trial, is reasonable based on this record.[17] *Cf. Sharkey v. Sterling*

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17. In fact, this award is consistent with the plaintiff's evidence of the cost of future care for Mr. Valdez in the Philippines.

Drug, Inc., 600 So.2d 701 (La.App. 1 Cir.), *writs denied*, 605 So.2d 1099, 605 So.2d 1100 (1992).

GENERAL DAMAGES:

The defendants argue that the award of $1,500,000 in general damages is excessive based on Mr. Valdez' injury and the fact that he can now:

> set his alarm clock and awake himself; groom and dress; prepare breakfast; walk at least one mile per day; lift weights independently; swim; perform lawn maintenance at least two hours per day including mowing and edging; make purchases; play board games; use a computer; select, watch and enjoy movies; go bowling; and otherwise initiate activities.

The discretion vested in the trier of fact is great, and an appellate court should rarely disturb an award of general damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1261 (La. 1993); *Coco v. Winston Indus., Inc.*, 341 So.2d 332 (La. 1977).

The defendants argue that because Mr. Valdez' residual abilities are greater and his residual disabilities less than plaintiffs who have recovered less than the amount awarded to him, the general damage award should be reduced substantially. However, it is only after an articulated analysis of the facts discloses an abuse of discretion, that the award may on appellate review be considered either excessive or insufficient. *Theriot v. Allstate Ins. Co.*, 625 So.2d 1337, 1340

(La. 1993), citing *Reck v. Stevens*, 373 So.2d 498, 501 (La. 1979).

In considering the question of an appropriate general damage award to Mr. Valdez the court recognized the devastating effect of the mental injuries on this young man as well as his very serious physical injuries. On May 26, 1993, a crane in the engine room of the Vestri broke and dropped a large piston rod on Mr. Valdez, fracturing both of his legs. He was air-lifted to a hospital in Florida, where he underwent a closed reduction of the fracture of his right leg and surgery to place traction pins in his left leg. The following day he became confused, and then comatose; he was intubated in and placed on a ventilator. It was determined that, as a result of his orthopedic injuries, a fatty clot lodged in his brain. He was in a coma for approximately a month, during which time he began slow neurologic improvement. He was transferred to a rehabilitation facility where he underwent acute rehabilitation for nine weeks. He then went to a community re-entry center where he continued his therapy. He was then placed with the Cardenas family in Miami for approximately ten months. Mrs. Cardenas described him as being like a baby "helpless and just staring into space all of the time" when he first came to her. She eventually was able to teach him to do chores around the house, and helped him to establish a steady routine. Despite Mr. Valdez' significant improvement during the time he was in her home, Mrs. Cardenas felt that he could not be left alone. He was transferred from the Cardenas home to the Living Center in New Orleans. There he received therapy geared toward improving his ability to interact with people and process information. Consequently, he now is able to care for many of his own needs, albeit in a structured and supervised setting.

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The experts disagree as to the impact of Mr. Valdez' cognitive deficit. Dr. Burke, defendants' expert in brain injury rehabilitation, opined that Mr. Valdez' physical functions, gross attention, language skills, social skills, pragmatic skills, and short-term memory were all within normal limits. Although Dr. Burke believes that Mr. Valdez requires some assistance with higher cognitive skills, and recognizes that he will require continued structure and supervision, he thinks that he can improve and become independent.

Plaintiff's experts believe that Mr. Valdez is incapable of taking care of himself outside of a structured environment. They seem to agree that he has reached a plateau, and he will not improve significantly. Instead, they opine that he needs continued therapy in order to prevent his regressing. Dr. Euginio Alcazaren, an expert in psychiatry with a particular expertise in physical medicine and rehabilitation, explained that Mr. Valdez is at risk to degenerate if he does not receive continued therapy. He opined that Mr. Valdez might vegetate and lose all functional ability. Dr. Michael Howard, an expert in counseling psychology, reviewed Mr. Valdez' medical records and performed a battery of tests in order to determine if he had cognitive and emotional deficits. He concluded that Mr. Valdez suffered a significant functional impairment; his intelligence quotient was in the mental retardation range and he functioned at the level of a child age ten or eleven. Dr. Howard compared Mr. Valdez to a ten year old latch-key child, who could look after himself for short periods of time, but who could not live on his own.

The tragedy of Mr. Valdez' situation is that, although he has diminished cognitive abilities, his long term memory is

intact so that he remembers what he was capable of doing before his injury. In other words, he has retained enough to know just how much he has lost. Dr. Maaba, an expert in forensic psychiatry, testified that Mr. Valdez suffers from low self-esteem as a result of his inability to be productive.

It appears that Mr. Valdez has received excellent care, and has made remarkable strides. However, the evidence establishes that before this accident he was a young man, with a future. Although the parties disagree as to the extent of his impairment as well as whether he may yet improve, there seems to be no dispute that Mr. Valdez's future is quite limited as a result of his injury and its sequelae.

In addition to his mental injuries, both of Mr. Valdez' legs were broken, and he underwent several surgeries. These surgeries have caused severe scarring. One leg is now shorter than the other causing permanent functional impairment. The court noted that it had "observed that what was apparently an energetic, intelligent and ambitious young man is now a dull, slow and almost pathetic invalid." The record supports this assessment. Mr. Valdez is now twenty-seven; he will live with the residual effects of the unseaworthiness of the Vestri for many years. His loss is significant, and we cannot say that the court's award of $1,500,000 in general damages, based on the record evidence, is an abuse of its discretion. The general damage award, therefore, is affirmed.

FOUND:

Defendants argue that the award of past found of $12,235 should be reversed and the award of $136,989.00 for future

found should be reduced to an amount not to exceed $15,000. As the trial court noted, found is the value of a seaman's living expenses aboard ship. This would include food, lodging and the value of other items provided to him by his employer aboard ship. Although we agree that Mr. Valdez has lost the found that his employer provided to him, we find that this loss has been included within the award for future medical care in this case. Therefore, the award of future found would constitute a double recovery to Mr. Valdez, and is not allowed. See, e.g., *Crane v. Exxon Corp., U.S.A.*, 613 So.2d 214, 226 (La.App. 1 Cir. 1993); *Reed v. Seacoast Products, Inc.*, 458 So.2d 971, 977 (La.App. 3 Cir. 1984).

Likewise, we find that the defendants' obligation for past found has been satisfied by its payment of maintenance. Plaintiff argues that a shipowner's obligation to provide found and its obligation to pay maintenance are separate and distinguishable. While found and maintenance may be separate benefits, they both compensate the seaman because he will no longer be living aboard ship. Although plaintiff contends that maintenance is the cost of maintaining the seaman ashore, it has not established that the maintenance rate paid to Mr. Valdez was less than the value of found.

For these reasons, the awards for past and future found are reversed.

CONCLUSION

The forum selection provision of the overseas employment contract signed by Mr. Valdez is not enforceable as to him, and the trial court was correct in applying United

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States law to his claim based on the *Lauritzen/Rhoditis* factors. The award of $3,000,000 for the cost of future medical care for Mr. Valdez is affirmed, as is the award of $1,500,000 for general damages, both of which are supported by the record. However, the awards of $12,235 and $136,989 for past and future found, respectively, constitute a double recovery, and are reversed. Each party is to bear its own costs.

AFFIRMED IN PART; REVERSED IN PART

Appendix A

NO. 96-CA-1013

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.

SCHOTT, C. J., DISSENTS FOR THE REASONS ASSIGNED BY KLEES, J., AND FOR THE FOLLOWING REASONS:

A significant portion of the majority opinion is devoted to a discussion of the opinions of the experts on the enforceability of the forum selection clause. After discussing these opinions and recognizing the conflicts among them the majority properly defers to the trial court's resolution of these conflicts. However, the opinions of the plaintiff's experts do not support the judgment of the trial court. These experts simply stated that a forum selection law would not be enforced in the Philippines or in Norway. This is not the issue. We are concerned with whether the clause is enforceable in Louisiana. Our Supreme Court says it is absent special circumstances which the plaintiff did not prove to exist in this case. There is nothing in the opinion of plaintiff's experts to suggest that he cannot pursue a claim in the Philippines or Norway if his case in Louisiana is dismissed. Since he can do so, there is nothing unreasonable or unjust about enforcing the clause and dismissing his case.

Appendix A

NO. 96-CA-1013

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF
CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.

Klees, J., dissents.

Because I find that the contractual forum selection clause entered into by plaintiff in this case is valid, enforceable and precluded plaintiff's suit in the lower court, I must dissent from the majority opinion. In rendering judgment in this case in favor of plaintiff, I believe that the trial court erred in two ways. First, I find that the trial court erred in resolving the choice of law issue and in applying United States law. Secondly, I believe the trial court erred in its application of United States law with respect to the enforceability of the contractual forum selection clause in view of the line of Louisiana jurisprudence leading up to the recent Supreme Court decision in *Lejano v. Bandak*, 97-0388 (12/12/97) 705 So.2d 158.

Choice of Law

As accurately stated by the majority, the *Lauritzen-Rhoditis* factors are intended to answer the choice of law

question, i.e. should the court apply the law of the United States or the law of another nation. Of the eight non-exhaustive factors set forth in those cases, the trial court stated that the most important factor to the court's determination of the applicable law is the issue of whether Mr. Valdez has a means of relief in any other forum. The trial court resolved this issue in the negative, and the majority opinion finds no error in the trial court's determination that the Philippines does not offer an adequate forum for Mr. Valdez' claim. I disagree.

On the question of choice of law, this Court has affirmed a summary judgment dismissing a personal injury suit by a Filipino seaman against a foreign vessel owner filed in the Civil District Court for the Parish of Orleans, finding that Philippine law, not United States law, governed the action by virtue of a forum selection clause in an employment contract, virtually identical to the clause at issue in this case. *Prado v. Sloman Neptun Schiffahrts A.G.*, 558 So.2d 712 (La. App. 4 Cir. 1990); *reversed and remanded on procedural grounds*, 565 So.2d 930 (La. 1990); 611 So.2d 691 (La. App. 4 Cir. 1992); *writ not considered*, 613 So.2d 986 (La. 1993).

Further, in *Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741 (La. App. 4 Cir. 1993), this Court followed the *Prado* decision in its interpretation of employment contracts drafted and regulated by the Philippine government. The Court in *Barcelona* affirmed the trial court's summary judgment in favor of defendants dismissing the claims of twelve Filipino seaman and the parents of a seaman who was killed in the course and scope of his employment. This Court found that *Prado* required an application of Philippine law as the choice of law, and succinctly stated as follows:

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> Louisiana has no interest in resolving disputes between Philippine citizens and foreign corporations arising from contracts drafted, regulated and approved by the Philippine Overseas Employment Administration and signed in the Philippines on a death claim from an accident which occurred in Europe. Rather, the Philippine government has a substantial public interest in providing these seamen with a fair hearing and just resolution of their claims.

The Court in *Barcelona* also rejected plaintiffs' claims which were similar to those raised in the present case and relied on by the trial court that the Philippines offered an inadequate and incompetent forum for the resolution of plaintiffs' claims.

After examining all of the Lauritzen-Rhoditis factors, as well as the decisions of *Prado* and *Barcelona* which I find to be controlling to the facts of the present case, I conclude that the trial court erred in applying United States law to the present lawsuit involving a claim brought by a Filipino seaman against a foreign shipowner. I believe that plaintiff's claim is governed by Philippine law, and I would vacate the trial court's judgment on this basis.

Forum Selection Clause

Even assuming the trial court was correct in choosing United States law as the applicable law, I believe that the clear terms of the forum selection clause entered into by plaintiff requires dismissal of plaintiff's suit in state court.

Appendix A

Plaintiff executed the standard POEA individual employment contract, which was exactly the same form as the contract executed by the plaintiffs in the cases of *Prado* and *Barcelona*. In both of those cases, the courts enforced the forum selection clauses. Further, as stated by the majority, the Louisiana Supreme Court rendered a decision following the trial of the present matter which directly controls the application of the forum selection clause in this case. In *Lejano v. Bandak*, 97-0388 (La. 12/12/97) 705 So.2d 158, the Supreme Court held that forum selection clause should be enforced absent a clear showing that enforcement would be unreasonable or unjust, and that the clause is invalid for such reasons as fraud or overreaching. Although the plaintiff in *Lejano* maintained that he had no power to negotiate the terms of the agreement he entered into with his employer because the contract was written in English, the Supreme Court held that the forum selection clause was enforceable as it had been approved by the Philippine government and it had been signed by Mr. Lejano, and was presumed to be the intent of the parties. Further, the Supreme Court's decision in *Lejano* has been followed recently by a panel of this court in *Sanchez v. Commodore Cruise Lines, Ltd., et al.*, 97-2355 (4/22/98) __ WL __.

The majority opinion distinguishes *Lejano* because the plaintiff in this case was not a veteran seaman and was not a member of the Philippine union that was a member of the collective bargaining agreement which led to the drafting of the employment contract. Further, the majority opinion agrees with the trial court's determination that neither the law of Norway or the law of the Philippines would enforce the forum selection clause under the facts of this case.

However, I fail to find these facts to materially distinguish this case from the facts presented in *Lejano*. Rather, I find that Louisiana courts have consistently upheld the enforceability of forum selection clauses such as the one here, absent evidence of fraud, undue influence or overreaching.

In the present case, Mr. Valdez signed the employment contract which plainly included the forum selection clause requiring him to bring all actions against the shipowner in Norway or the Philippines. The employment contract was approved by the POEA, and regardless of whether Mr. Valdez was a member of the union which participated in the collective bargaining agreement which gave rise to the terms of the contract, Mr. Valdez obviously benefits from the contract. The fact that Mr. Valdez was not a veteran seaman or a member of AMOSUP does not in itself indicate that the contract was "affected by fraud, undue influence, or overweening bargaining power," as was the test for enforceability in *Lejano*. Further, as in *Lejano*, the employment contract drafted and approved by the POEA would certainly be enforceable in the Philippines, and I do not find that plaintiff has no available forum in that country.

In the present case, I find that Mr. Valdez failed to make a clear showing that enforcement of the forum selection clause in the employment contract would be unreasonable, unjust, fraudulent or overreaching such to render it unenforceable. Based on the standards set forth by the Supreme Court in *Lejano* which I find to be applicable herein, I find that the forum selection provisions of Mr. Valdez' employment contract are enforceable under the laws of the United States. I would therefore vacate the judgment of the trial court and remand the case to the trial court to allow plaintiff to file his suit against the shipowner in the Philippines or Norway, as stated in the employment contract.

APPENDIX B — JUDGMENT WITH REASONS FOR JUDGMENT OF THE TWENTY FIFTH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, STATE OF LOUISIANA DATED AND FILED JANUARY 31, 1996

TWENTY FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NUMBER: 38-719 DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ

versus

SMEDVIG TANKSHIPS, LTLD., ET AL

FILED: JAN 31 1996 s/ [illegible]
DEPUTY CLERK

JUDGMENT

This matter came on for trial on the 11th, 15th, and 22nd days of September, 1995.

PRESENT: RICHARD J. DODSON, DAVID C. VIDRINE, and PHILLIP F. COSSICH, JR. for the Plaintiff, Nestor Abuan, as guardian on behalf of Carlos Valdez;

DAVID B. LAWTON and LAURENCE R DeBUYS, IV, for the Defendants, Smedvig Tankships, Ltd., et al;

Appendix B

When, after hearing the evidence, the stipulations and argument of counsel, the Court considers the law and the evidence to be in favor of the Plaintiff, for the reasons assigned this date in writing;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Plaintiff, Nestor Abuan, as guardian an behalf of Carlos Valdez, and against the Defendants, Smedvig Tankships, Ltd., Smedvig Tankships (Agencies), Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/d/a Smedvig Tankrederi A.S., Peder Smedvig, A.S., Peder Smedvig Singapore, Pte., Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI, in the sum of FIVE MILLION FORTY-TWO THOUSAND FIVE HUNDRED SIXTY-THREE AND 00/100 ($5,042,563.00) DOLLARS, which is itemized as follows:

(1) General Damages:	$1,500,000.00
(2) Loss of Past Wages:	18,592.00
(3) Loss of Future Wages:	374,747.00
(4) Future Medical Care:	3,000,000.00
(5) Past Found:	12,235.00
(6) Future Found:	136,989.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants are ordered to pay all costs of those proceedings, including expert witness fees, plus judicial interest from the date of the accident complained of herein on 20% of the general damage award, or $300,000.00, and judicial interest from the date of this judgment until paid on the remainder of the damages awarded herein.

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JUDGMENT READ, RENDERED, AND SIGNED at Pointe-a-la-Hache, Louisiana, this 31st day of January, 1996.

s/ [illegible]
JUDGE

Appendix B

TWENTY FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NUMBER: 38-719 DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ

versus

SMEDVIG TANKSHIPS, LTD., ET AL

FILED: JAN 31 1996 s/ [illegible]
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter is a claim for damages under the Jones Act and general maritime law of the United States brought in this Court pursuant to the savings to suitors clause and tried to the Court without a jury. The assertion of jurisdiction in this Court was based on an in rem attachment of a vessel within the Parish of Plaquemines.

The Plaintiff, Nestor Abuan, is the legal guardian of an injured Filipino seaman, Carlos Valdez[1]. Valdez was an employee of one of the Defendant-corporations and was working on the M/V Vestri, an oil tanker plying the waters

1. Hereinafter, "Plaintiff" will refer to the injured seaman Carlos Valdez unless otherwise specified.

in and around ports located within the United States. While just off the coast of Florida, Valdez suffered serious physical injuries when an overhead crane in the engine room failed, dropping a large piston on Valdez.

Valdez was air-lifted to the United States for medical treatment where he has remained as of the time of trial. Because of his status as a Filipino natural, the foreign registry of the vessel on which he was injured, and the fact that relief in this forum has been sought through the exercise of an in rem attachment, there have been presented complicated questions of this Court's right to hear the matter. The procedural history of the matter is relevant to the Court's exercise of jurisdiction and choice of laws to apply in the matter.

PROCEDURAL HISTORY

As stated, this litigation began with the suit for damages filed herein and the assertion of jurisdiction by the Plaintiff over the Defendants by virtue of an in rem arrest or attachment of a vessel owned by the Defendants while it was physically located within Plaquemines Parish. The Defendants secured the release of that vessel by providing a "Letter of Understanding."

The Defendants excepted to the jurisdiction of this Court and, alternatively, urged the application of the doctrine of forum non convenience. A hearing on those exceptions was held on November 9, 1994, the Court found that the in rem attachment was sufficient to allow this Court to assert jurisdiction over the Plaintiff's claims, and the exceptions were denied.

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Those rulings were appealed and on July 28, 1995, the Louisiana Court of Appeals for the Fourth Circuit denied writs, holding that the exercise of supervisory jurisdiction was not warranted because the Defendants had an adequate remedy on appeal. While the appellate court refused to exercise its supervisory jurisdiction, it did not rule on the substantive issues presented. This Court, in denying the exceptions, also did not specifically rule on the issue of choice of laws. Thus, it is a matter which has been decided by the Court de novo.

The trial of this matter proceeded in September, 1995, with the presentation of numerous witnesses and deposition testimony as well as voluminous documentary evidence. To be resolved by the Court are several significant issues.

The Defendants have put at issue the "choice of laws," that is, whether this Court, assuming jurisdiction is proper, may apply the Jones Act and general maritime law of this country and state, or whether it must apply the law of the flag of the vessel or of the injured Plaintiff's domicile. The Defendants urge that the employment contract by which the Plaintiff was on board the vessel mandates application of the law of the Philippines which, in turn, would require the enforcement of a choice of forum provision requiring Valdez to seek relief in the Philippines and divesting this Court of jurisdiction.

Secondly, this matter presents significant controversy as to the extent and nature of the Plaintiff's injuries, particularly in terms of the nature of the medical care which he may require in the future. In that context, the Defendants have

also put at issue exactly where that medical care should occur, arguing that this Court should make a determination that the cost of Plaintiff's future care should be based on the cost of services in his native country.

There is no doubt in this matter that the Plaintiff suffered severe and debilitating injuries and will need care of some type for the rest of his life. He has severe disabilities of a permanent nature which incapacitate him and preclude him from any meaningful future employment.

The fact of the Plaintiff's injury is not in dispute and the Defendants have not strenuously argued the absence of liability under this country's general maritime law. Rather, they have urged that the application of the substantive law of Norway or the Philippines is mandated. Each of the issues have been resolved in connection with the judgment rendered herein.

JURISDICTION

This issue has been foreclosed by virtue of this Court's ruling denying the Defendants' exceptions and the denial of writs by the court of appeals. However, because both parties have again raised the issue in post-trial memorandum and the issue may certainly be raised on appeal, this Court will revisit its prior ruling for the purposes of clarification.

The issue is one of choice of laws in terms of whether the law of this country will be applied affording the injured seaman a forum, or whether this Court will apply another country's substantive and procedural law mandating the

enforcement of a forum selection clause in the Plaintiff's employment contract. The method of analysis in resolving such an issue is well settled.

Two decisions of the United States Supreme Court constitute the foundation of the analysis to be used. In *Lauritzen v. Larsen*, 73 S.Ct. 921 (1953), and *Hellenic Lines v. Rhoditis*, 90 S.Ct. 1731 (1970), several factors are set forth to be utilized in determining whether this country's laws should be applied. The analysis of these factors by this Court and courts within this jurisdiction are well illustrated by decisions such as *Madrid v. Polembros Maritime Co., Ltd.*, 95-C-0545 (La.App.4 Cir, 8/30/95); 660 So.2d 955; *Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741 (La.App.4 Cir.1993); *Prado v. Sloman Neptune Shiffahrts, A.G.*, 611 So.2d 691 (La.App.4 Cir.1992).

The *Madrid* decision succinctly summarizes the purpose of this analysis by pointing out that the *Lauritzen* decision involved a determination that, at 956:

> "[I]nternational or maritime law has attempted to avoid or resolve conflicts between *competing* laws by ascertaining and valuing points of contact between the transaction and the states or governments whose *competing* laws are involved."

The mechanics of the analysis of this choice of law determination involve eight factors set forth in *Lauritzen* and *Rhoditis*. The Plaintiff has submitted an extensive amount of evidence directly related to those eight factors and their applicability to the Court's determination of the issue in this matter.

For instance, the place of the accident is a factor of importance. The Plaintiff was injured in international waters but just off the coast of Florida. In fact, he was transported to a hospital in the Florida Keys by a United States Coast Guard helicopter.

The law of the flag of the vessel is to be considered by the Court. The Defendants argue that this is the most compelling factor and is to be given the most weight under the authority of *Lauritzen*. The flag of the vessel in this matter is Norwegian.

However, the Plaintiff properly points out the language of the *Rhoditis* decision wherein such heavy weight is not given the law of the flag when the flag is merely one of convenience. The Plaintiff has submitted deposition testimony from other litigation (as a joint exhibit with these Defendants) to the effect that the flag of this vessel results from a 1987 amendment to the Norwegian law which allows registry under an international ship registry allowing the employment of foreign seaman. Prior to 1987 a Norwegian shipper could not fly Norwegian registry and employ non-Norwegian seaman.

That factor along with the substantial contacts between this vessel and the United States convince the Court that the flag of the vessel is not of critical importance and does not mandate application of that country's law. Such a determination is bolstered by the fact that, while the Defendants argue this factor is "cardinal", the Plaintiff's employment contract requires that claims be brought in *either* Norway or the Philippines. Thus, even this contract negates the importance of the law of the flag.

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The evidence in this matter also establishes that the vessel on which the Plaintiff was injured was of Liberian registry and owned by an independent shipping line[2]. Its parent company, Smedvig Tankships Limited, is a Bermuda corporation. It has subsidiary corporations in Singapore (for the purposes of manning its vessels); in Norway (for administering the operations); in Bermuda (management); and in London (for conducting financial matters).

While Smedvig is of Norwegian origin, a 1993 reorganization and public offering of its stock resulted in the diversification described hereinabove. This diversification lessens the importance of the traditional allegiance to Norway which might have otherwise been critical to the Court's determination. In fact, the 1993 reorganization, which was accompanied by the parent corporation going public with a stock offering, was motivated by and intended solely to allow the Defendants to more actively profit from the United States shipping market.

The Defendants urge the importance of the fact that their base of operations is in Norway. They submit evidence that Smedvig has no offices, employees, or bank accounts in the United States and that the operation of the vessel originates in Norway. However, the evidence establishes that the M/V VESTRI earned 100% of its income from voyages that began

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2. The Defendants assert that the corporation which actually held title to the vessel at the time of the accident was not of Liberian registry and it is the new owner, not a party to this suit, which is of Liberian registry. The fact of transfer of registry between the time of this accident and this trial only illustrates the relative insignificant of the flag of the vessel.

or ended in United States ports and which income came from a charter by an American company — Amoco. In fact, Valdez originally boarded the vessel and began his employment in Philadelphia.

Most important to the Court's determination is the issue of whether this Plaintiff has a means of relief in any other forum. The Defendants urge the applicability of his contract of employment ratified by the Philippine Overseas Employment Administration (POEA) and which provides that he make seek relief in the courts or the Philippines.

The Plaintiff has submitted evidence that the POEA has uniformly refused to accept jurisdiction over or litigate claims for personal injuries to Filipino seaman[3]. The Plaintiff has provided citations to numerous decisions of the POEA declining jurisdiction over personal injury claims. The POEA will only accept jurisdiction over and litigate contract and wage matters.

Additionally, the Plaintiff has established that neither the POEA or the Philippine civil courts have compulsory process or a means of asserting jurisdiction over non-residents. They also lack the power to enforce judgements rendered against a party unless the action is based on in personam jurisdiction.

Neither is it likely that the Plaintiff has an accessible forum for his claims in Norway. Despite the representations

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3. By executive order of the President of the Philippines, the POEA has been given exclusive jurisdiction to hear claims by Filipino seaman employed overseas. Thus, the Filipino courts offer no remedy to an injured seaman such as this Plaintiff.

made by the Defendants, the Plaintiff has established relevant facts of critical importance. The Plaintiff has submitted evidence that over fourteen thousand Filipino seaman were employed in 1993 on ships registered in the Norwegian International Ships Register, yet, in the history of Norway, there has never been a reported case of litigation by a Filipino seaman against a Norwegian shipowner in the Norwegian courts.

These apparent impediments to the Plaintiff's access to those foreign forums presupposes his ability to reach them and to effectively assert his claim. All of the witnesses in this matter are located in this country, as is the Plaintiff. The Plaintiff has indicated his preference to remain in this country permanently and now considers the United States his home.

These facts and those relevant to the other of the eight factors not specifically discussed herein but which have been carefully considered convince the Court that the Plaintiff should be able to assert his claim under our laws. A careful review of the prior jurisprudence mandates this determination.

Barcelona, for instance, upheld the enforcement of a forum selection clause in a Filipino employment contract. However, it is clearly distinguishable from this matter on its facts, as the Court has previously ruled. In that matter, the court held, after an analysis of the eight factors, at 744:

> "There is no justification for a Louisiana court asserting its jurisdiction to intervene in matters arising between foreigners and the laws of their domicile. All of the plaintiffs, witnesses and

> evidence are located in the Philippines. . . . Louisiana has no interest in resolving [these] disputes . . . Rather, the Philippines has a substantial public interest in providing these seaman with a fair hearing and just resolution of their claims."

As has been discussed, all of the plaintiffs, treating medical witnesses, and medical evidence are located in the United States. The Plaintiff has decided to remain in permanent residential care in this country. Because of the particular facts already discussed in connection with the eight factors, the Philippines has little public interest in the resolution of this claim. Louisiana does have an interest in its resolution in order to insure the effectuation of the principles behind the Jones Act and general maritime law.

The Defendants rhetorically ask in memorandum questions about fair play and substantial justice in terms of forcing our law on foreign sovereigns and corporations. They ask how fair it is to subject them to this forum solely for flying an injured foreign seaman into the United States for emergency treatment. The other edge of that sword is the concept of fair play in conducting maritime operations such that thousands of third-world people are recruited into a system providing them no realistic means of relief for injury or death occasioned by that very hazardous activity. As stated by the court in *Rhoditis*, and as cited by the *Madrid* court at 957:

> "[We see] no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operating in this

> country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer.' "

Once again, the evidence establishes that this vessel and the corporations managing its operation were created solely for the purpose of profiting from the vessel sailing to and from American ports pursuant to a contract with an American corporation. To not subject these Defendants to the obligations codified in the Jones Act and amplified in the general maritime law of this country is to afford them an advantage over their competitors which itself violates a sense of fair play and substantial justice.

In *Prado*, the court found virtually no contacts with the State of Louisiana and believed the plaintiff to be seeking relief in a Louisiana court simply to "secure relief more generous that he would get under the law of his homeland." The court found the employment contract of the Filipino seaman to be enforceable and that the doctrine of forum non conveniens, if available to a Louisiana court in a maritime case, would be the proper means of disposing of the matter. Because no such remedy was available, the court accomplished the same result by resorting to the forum selection clause of the employment contract.

Prado is also distinguishable on its facts based on the same analysis performed herainabove. This Court has not reached the same conclusion it did in *Barcelona*[4] or as was

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4. *Barcelona* was decided by this Court on the district court level.

reached in *Prado* not because it has rejected the principle of law but because of the facts which distinguish the matters. The results of this Court's analysis in this matter can best be summarized by language from *M/S Bremen v. Zapata*, 92 S.Ct. 1907 (1972), found at 1913, wherein the court found that the justification for allowing a seaman to avoid a forum selection clause is that:

> ". . . the trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

Such a result is guaranteed were the Plaintiff in this matter compelled to seek relief where the Defendants would have him compelled to do so. For all practical purposes, he has no other forum available to him were this Court to deny him relief. Thus, the in rem seizure afforded the Plaintiff jurisdiction in this forum and this Court has applied the law of this country to the Plaintiff's claims.

The Court is reminded of the language in the *Prado* decision wherein the Fourth Circuit adopted the language of the federal courts and, at 704, stated:

> "Seaman, as wards of the court, are entitled to a careful review when a district court refuses to exercise jurisdiction over their claims. We are convinced that federal courts must remain vigilant in protecting the rights of seaman, whether foreign or domestic, in their relations with their employer." citing from *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240 (5th Cir.1991).

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Even the *Prado* court, while requiring the Filipino seaman to pursue his claim in the Philippines, made the following reservation, again at 704:

> "[I]n the event Prado should produce satisfactory proof to the trial court that [the defendant] has attempted to frustrate his efforts to pursue this claim in the Philippine forum . . . then the trial court may proceed to adjudicate this claim in a manner consistent with this opinion and the law of the Philippines.

Thus, even in dismissing the claim of a foreign seaman, the Fourth Circuit recognized the importance of providing a forum to the seaman. That factor is of no less importance in this matter and is the predominate factor in this Court's determination.

LIABILITY

The issue at trial in terms of liability, apart from the question of choice of laws, is whether the failure of the crane establishes Jones Act negligence. The Defendants admitted in response to interrogatories that the vessel was unseaworthy as a result. However, they deny that negligence has been established.

The burden of proof in establishing Jones Act negligence is discussed by the Louisiana Fourth Circuit Court of Appeals in *Mistich v. Pipelines, Inc.*, 609 So.2d 921 (La.App.4 Cir.1992). As to recovery for negligence, the court stated, at 929:

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> " '[U]nder the Jones Act, a vessel owner will be deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe work environment.' *Ceja v. Mike Hooks*, 690 F.2d 1192 (5th Cir.1982). The slightest negligence is sufficient to sustain a finding of liability under the Jones Act." (citations omitted)

With respect to the Plaintiff's accident, he claims that the Defendants were negligent under the Jones Act for failing to inspect the crane which broke, causing the accident. The Defendants argue that the crane was properly inspected only fifteen months prior to its failure and that they had no further duty of care in regards to its inspection or the prevention of this accident.

In order to recover under Jones Act negligence, the Plaintiff must simply show by a preponderance of the evidence that his employer failed to exercise reasonable care to maintain a reasonably safe work environment. Because the Plaintiff is a seaman his burden of proof is "featherlight" and the "slightest negligence" on the part of the Defendant is sufficient to impose liability under the Jones Act. *Butler v. Zapata Haynie Corp.*, 92-71 (La.App.3 Cir. 2/23/94), 633 So.2d 1274.

> "A Jones Act employer is under a duty to provide his seaman-employee a safe place to work. That is, '. . . a place where the employee can work without exposure to an unreasonable risk of harm. Failure to exercise reasonable care to fulfill this duty is negligence."

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Osorio v. Waterman S.S. Corp., 557 So.2d 999, 1005 (La.App.4 Cir.1990), citing *Huff v. Compass Nav. Inc.*, 522 So.2d 641 (La.App.4 Cir.1988), writ denied, 526 So.2d 797 (1988).

These cases illustrate the point that if the work environment is such that the plaintiff is subjected to peril resulting in injury, any negligence on the part of the employer in causing that environment or allowing it to persist will result in liability. The question is thus presented as to whether the Defendants breached their duty to Valdez to provide a safe place to work, that is, a place where the employee can work without exposure to an unreasonable risk of harm, by not discovering the crack in the crane's housing prior to its failure.

There is no question that this vessel was unseaworthy as a result of the failure of the crane. In *Mistich*, at 931, the court discussed the basis for recovery under a theory of unseaworthiness and stated:

> "To be considered seaworthy, a vessel and its appurtenances must be reasonably suited for the purpose or use for which they were intended. . . . An absolute and non-delegable duty is imposed on the shipowner to furnish a vessel reasonably safe and fit for its intended purpose. . . . Any condition rendering the vessel unfit for her intended use makes the vessel unseaworthy. . . . Unseaworthiness may arise from the employment of an unsafe method of work such as the shipowner's failure to provide adequate equipment for the performance of an assigned task or necessary safety equipment."

See also *Spangler v. North Star Drilling Co.*, 552 So.2d 673, 677 (La.App.2 Cir.1989).

There are several reported cases involving the failure of a piece of equipment on a vessel in terms of a seaworthiness claim. In *Lee v. Pacific Far East Line, Inc.*, 566 F.2d 65 (9th Cir.1977), a ship's refrigerator maintenance man was injured when he attempted to turn a stuck coolant valve. The court noted the obligation on a shipowner to maintain a ship's equipment in proper operating condition and found that; "The failure of a piece of vessel equipment under proper and expected use is sufficient to establish unseaworthiness."

In *Villers Seafood Co., Inc. v. Vest*, 813 F.2d 339 (11th Cir.1987), the court found that a presumption arises that a ship's equipment is defective or unseaworthy when it breaks under normal use. In that matter a seaman fell from a ladder that was not properly attached to an upper deck beam.

The United States district courts have utilized this principle of law in cases such as *Thibodeaux v. Rowan Drilling Co., Inc.*, 314 F.Supp. 543 (W.D.La.1969), wherein a roughneck was injured when a set of tongs used to tighten drill pipe failed, causing him injury. The tongs were found to have been worn down from use and could no longer properly hold the pipe.

While the unseaworthiness of the vessel is not disputed, these cases serve to illustrate the distinction between such a finding and vessel negligence. In some instances in which a vessel is considered unseaworthy by virtue of the failure of a piece of equipment, there is the basis for the imposition of

liability based on vessel negligence. However, as mentioned, while the condition of unseaworthiness is imposed without fault, it is only if the vessel owner failed to exercise due care in ensuring that the vessel remained seaworthy is negligence established.

In *Lee v. Pacific*, the court stressed that, in defective equipment cases, the concept of unseaworthiness "swallows" any notion of liability based on maritime negligence. In other words, if negligence is proven, unseaworthiness is necessarily established because the former requires actual or constructive knowledge, an element not required for the latter. The opposite is not true, however.

Because unseaworthiness is established does not establish negligence. There must be proof of actual or constructive knowledge of the condition which rendered the vessel unsafe. There was little evidence of such knowledge in this matter.

The only witness presented on the issue was Dr. Jerry Householder, a civil engineer. He inspected the crane's housing and determined that there existed a hairline crack which caused the housing to come apart under a load. However, he testified that this crack was as little as one-half to one-and-one-fourth inches long.

More importantly, Dr. Householder could not say exactly what caused the crane's housing to fail. He admitted that if one of six bolts holding the housing in place was lost the other five should hold and that, as a result, he believes that there was something else going on with the housing which led to the accident. While Dr. Householder believed that an

inspection might have led to the discovery of the hairline crack, his testimony does not establish that the hairline crack, itself, is the cause of the crane's failure.

Additionally, the evidence established that the crane was load tested approximately fifteen months before its failure. While Dr. Householder discounts the sufficiency of a load test and would require the vessel owner to visually inspect the housing for cracks, he does not offer evidence that a visual inspection of the housing and the discovery of a one-half inch hairline crack would have even alerted the Defendants to possible trouble.

Under the general maritime law and Jones Act for claims of negligence, a party's negligence is actionable only if it is a "legal cause" of the plaintiff's injuries. Legal cause exist if the negligence is a "substantial factor" in bringing about the injury. See *In re Cooper/T.Smith*, 929 F.2d 1073 (5th Cir.), cert. den., 502 U.S. 865 (1991); *Usé v. Usé*, 94 CA 0972 (La.App.1 Cir, 4/7/95); 654 So.2d 1355.

In a state law negligence claim, this Court would apply a duty/risk analysis which is similar to the standard of negligence under the Jones Act. In a Jones Act claim, the plaintiff must establish a duty, breach of that duty, injury, and causation between the defendant's conduct and the injury. Principally, the resulting harm must be "reasonably foreseeable" in order for the plaintiff to recover.

Under either approach the Plaintiff in this matter has failed to establish negligence. His argument that the Defendant's failure to inspect the crane's housing ignores

the critical issue presented in terms of the analysis set out in the *In re Cooper/T. Smith* matter. There is simply no evidence that the hairline crack is what caused the crane's failure and that, as a result, the failure to note that crack is what led to the Plaintiff's injuries.

Because Valdez has failed to establish that his employer was negligent for not detecting the hairline crack on the crane's housing or, more importantly, that any such failure was the cause-in-fact of his injury, his claim under the Jones Act has been dismissed. Liability in this matter arises by virtue of the determination of unseaworthiness, as discussed hereinabove.

DAMAGES

Several issues were presented in terms of the severity or nature of Valdez's injuries and the need for future treatment. In an effort to substantiate the claim that he was permanently disabled and in need of permanent residential care, he offered the testimony of numerous medical professions. They included the physicians who treated and continue to treat Valdez as a result of his accident as well as several medical professionals who examined Valdez for the purpose of this litigation.

The specific issues are two-fold. The Plaintiff's position is that his continued care must necessary be in-patient in nature and preferably in the facility where he is presently treated. The Defendants urge that the evidence establishes that the Plaintiff's future care can be adequately provided on an out-patient basis.

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The second significant aspect of medical treatment is where that treatment should be received. The Plaintiff is presently in residential treatment in Louisiana and proposes that he remain there. The Defendants argue that the basis of determining the costs of future medical care should be determined in accordance with such cost in the Philippines. They urge that since the Plaintiff is Filipino, his family is located there, and that the Plaintiff allegedly has expressed some preference for returning to his life-long home, this Court should assess the cost of medical care accordingly.

The determination of that issue depends on a careful analysis of the nature of the Plaintiff's injuries as well as the history of the treatment he has received. While he has substantially recovered from his physical injuries, the residential effect on his mental capacities is more significant.

The accident leading to this litigation occurred on May 26, 1993, when an overhead crane in the engine room broke while holding a large piston rod. It fell on Valdez and he suffered fractures of both lower legs. The vessel was located in waters just south of Florida at the time of the accident and Valdez was air-lifted to a hospital in the Florida Keys.

At that facility Valdez underwent surgery for the placement of traction pins for the left femur and closed reduction for the right tibia fracture. However, the next day, on May 27, 1993, it was difficult for the medical personnel to rouse him from his sleep and he appeared confused. He then quickly became comatose and rigid with a flexed arm. He required intubation and ventilation.

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Valdez was transferred to Cedars Medical Center in Miami. The initial impression was severe fatty embolizing syndrome. That condition results from severe orthopedic injuries throwing fatty blobs, or clots, which travel through the body and lodge in different parts of the body. In Valdez's case it lodged in his brain.

He was in a deep coma and was posturing, that is, his body was drawing into a fetal position. He also exhibited problems breathing and suffered a lack of oxygen to his entire system, including his brain. Again, he was kept on oxygen and was comatose for about a month.

During this time he exhibited some slow neurologic improvement and was transferred to the Sunrise Rehabilitation Center on July 2, 1993. At that facility he underwent acute rehabilitation for nine weeks and was discharged on September 5, 1993.

Valdez was transferred to the Community Re-entry Center of South Florida for continued therapy. During that time Nestor Abuan was appointed his guardian and he was eventually placed in the care of a Filipino family in Miami. He lived with them for about ten months.

In October, 1994, Valdez was transferred to the Rehabilitation Living Center in New Orleans where he remained as of the time of trial. That facility is a residential center with rehabilitative and therapeutic services provided on a full-time basis.

An abundance of evidence was admitted as to the nature of care needed by the Plaintiff in the future. Additionally,

both parties submitted substantial evidence as to the availability and/or adequacy of medical care available in the Philippines. The Court will deal first with the issue of the nature of medical care needed by the Plaintiff in the future by reviewing the testimony of the medical professionals who treated and/or evaluated Valdez's injuries or who offered testimony as to his capabilities.

The Plaintiff presented the deposition testimony of Dr. Lauren Lerner, the attending physician for Valdez at the Sunrise Rehabilitation Hospital and the Community Re-Entry Hospital. She is a board certified physician in the area of physical medicine and rehabilitation as well as electro-diagnostic medicine. This area of medicine is known as "Physiatry" and is described as a medical specialty focusing on the comprehensive management of individuals with disabilities. Her present practice consists of brain injury and spinal cord rehabilitation with the latter taking up about two-thirds of her practice.

Dr. Lerner's related the treatment history of Valdez. She indicated that he was injured on May 26, 1993, and became unresponsive and developed a fat embelia to the brain the next day. They discovered he had low blood oxygen, that is, he was hypoxic. He became comatose with his pupils dilated and had to be placed on a ventilator. He was given a tracheotomy and a tube was inserted for breathing and feeding.

When first transferred to Sunrise Rehabilitation Center on July 2, 1993, he was awake and could follow one-step commands, however he was incomprehensible and was put

on Dilantin to prevent seizures. His feeding tube was removed and his rehabilitation began.

During that time he progressed from requiring maximum assistance to being independent in terms of his physical skills. However, Dr. Lerner found that he had suffered cognitive defects as a result of the accident. His reading comprehension, immediate recall, and perceptual skills were all diminished.

Dr. Lerner believed that Valdez was not capable of independent living at the time of discharge from Sunrise and he was sent to Community Re-Entry for further rehabilitation. Dr. Lerner saw him three times at that facility and found that he had an excellent functional outcome. However, she still found cognitive defects and that he was not capable of independent living without supervision.

In connection with her testimony at this trial Dr. Lerner reviewed reports of Dr. Michael Howard which were prepared for the purposes of litigation and agreed with Dr. Howard that Valdez has cognitive abilities consistent with an eight or nine-year-old child. She testified that she believes Valdez will need supervision for the rest of his life in a structured setting.

Dr. Lerner believes Valdez to be in need of a setting where he is supervised and relatively distraction free, where he is provided verbal cues, and activities are initiated for him. She believes that he needs assistance in improving his functional memory by having lists and other compensatory techniques provided for him and he requires vocational assistance so that he may learn to do repetitive tasks through simulation.

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Dr. Robert Voogt is the owner and director of the Rehabilitation Living Center located in New Orleans where Valdez has resided since his release from the Community Re-Entry Center in Florida on October 13, 1994. Dr. Voogt was qualified by the Court as an expert witness in the field of "long term care and treatment of traumatic brain injury victims."

Dr. Voogt described the Living Center as a twenty-three bed residential facility for patients who have sustained neurological impairments from brain or spinal cord injuries and who require residential care. He holds four licenses in connection with the operation of that facility which include rehabilitation counseling and residential care.

Dr. Voogt examined Valdez upon his admission at the Living Center and reviewed his medical history. He concluded that Valdez has impairment of what he calls "executive functions," that is, functions such as memory and abstract thinking which lead to limitations on his ability to think, to process information, make decisions, and to have insight.

Because these limitations prevent his brain from providing Valdez with what it takes to structure and organize his life on a daily basis, Dr. Voogt considers Valdez to be in need of a structured environment. Dr. Voogt agrees with other diagnosis that Valdez has the mental capacity of an eight or nine-year-old child. However, Dr. Voogt distinguished Valdez's condition from a child because he believes that Valdez will never progress past his present mental level while a child would.

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In distinguishing Valdez's condition from someone who is mentally retarded, Dr. Voogt stressed that Valdez's long term memory is intact such that he remembers what he was capable of before his injury. Dr. Voogt stressed the significance of the fact that Valdez had two years of college in marine engineering and lived independently prior to his injury in terms of the impact of his injuries on Valdez.

Dr. Voogt believes that Valdez needs continuing vocational training, cognitive therapy, and supervised activities which can only be properly administered in a residential setting. He distinguished a residential facility from a plan of care which would encompass having someone live with Valdez in a private home by the amount of structured activity which would take place in the former. While the care provided in a home setting might be adequate from a medical stand-point, Dr. Voogt rhetorically asked what Valdez would do all day. Certainly he would not have the benefit of the therapy and training which he now receives.

Significantly, Dr. Voogt admitted that Valdez suffers from no health problems and is extremely mobile and capable of performing all of the physical activities afforded at the facility. Most of his day is spent doing horticulture, working in the kitchen at the facility, cutting grass, and doing other menial tasks.

When first admitted to the Living Center Valdez was examined by a cognitive therapist who found that Valdez had suffered a mild memory impairment; moderate to severe impairment in constructing geometric designs; good ability to follow written instructions and to learn; good attention

focus, and that he needed no formal cognitive therapy. In fact, Valdez actually received no cognitive therapy for the first three months he was at the Living Center.

As a result of a speech and language therapy evaluation performed soon after entering the Living Center, the conclusion was reached that Valdez did not need individual speech language therapy. As a result, Valdez actually sees professionals on less then a daily basis. In total, he spends about three-and-a-half hours a week with speech and cognitive therapists.

That therapy, Dr. Voogt testified, deals more with "pragmatic's" rather then with speech therapy. Dr. Voogt describes this therapy as dealing with improving Valdez's ability to interact with people and with information processing. While Dr. Voogt admits that Valdez does well in this regard, he denies that Valdez is capable of independent community mobility, that is, moving about the community without supervision.

Additionally, Dr. Voogt admitted that Valdez is presently independent in terms of his hygiene and bathing; he can set his own alarm clock, rise, get dressed, get to the kitchen and fix his own breakfast; and he can follow his daily schedule. He is also capable of independent money management although Dr. Voogt differentiates this from being able to handle his finances.

Dr. Voogt characterizes Valdez as generally happy and that he has shown a good amount of initiation in regards to social tasks. For instance, Valdez asked to begin studying to

take a driver's license test and he also undertook to prepare a Filipino meal for his fellow residents and staff.

A treatment plan was developed for Valdez soon after his arrival at the Living Center which included increasing his vocational skills to the level of employment for a supervised work environment. That goal was eventually reached.

Dr. Voogt described the goal of rehabilitation as that of returning a patient to the least restrictive environment possible, and eventually to their own community and family if possible. He also admitted that the average stay in the Living Center for patients with brain injuries is eighteen months to two years. However, he stressed that in instances with the level of brain injury suffered by Valdez, individuals who are returned to their families end up in nursing homes, locked psychiatric facilities, or mental retardation hospitals.

He considered it vital to Valdez's care that he be treated in a brain injury facility with resident coaches, case managers, and social, recreational, and therapy programs. All of those things would not be available in a private home setting or a psychiatric hospital.

Lilly Cardenas testified by deposition in connection with this matter. She is a seventy-four year-old former pharmacist from the Philippines who has lived in the United States for approximately sixteen years, most recently in the Miami area.

Mrs. Cardenas, along with her husband, a medical doctor and former Colonel in the Philippine army, own a five

bedroom home and reside there with an adult son and that son's family. Nestor Abuan is their son-in-law.

At Abuan's request, Valdez was moved into the Cardenas residence upon his discharge from the Community Re-Entry Center in October, 1993. He resided with them for approximately eleven months.

Mrs. Cardenas related that her first reaction upon having Valdez move into her residence was to suggest to Abuan that she might not be able to care for him. She describes him as having been like a baby — helpless and just staring into space all of the time. In fact, she termed his responsiveness as being like a zombie's, completely unresponsive to questions.

She related a remarkable improvement in Valdez over the eleven months that he lived with her. She eventually taught him to cut vegetables and cook, to do gardening and cut the grass, to vacuum the pool, and to do other chores around the house.

By the time Valdez left the Cardenas household he had adopted a steady routine. Mrs. Cardenas related that Valdez would get up at 7:30 a.m. and she would fix his breakfast. She would show him how to clean the house, which would be his exercise in the morning, and at noon she would prepare his lunch. After he had eaten and put up his plates, Valdez would take a long nap from 1:00 to 4:00 p.m. and watch television in his room. After that he would go down and read the newspaper. At dinnertime he would eat, watch television and then go to bed at 9:00 p.m.

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While Valdez showed improvement in his ability to communicate and perform daily functions, Mrs. Cardenas pointed out significant aspects of his behavior which have great bearing on this matter. While she was able to teach him tasks such as putting up the dinner plates, she complained that he could not really remember the tasks and she would have to show him six times before he would assimilate anything.

While they taught Valdez how to fertilize the plants he eventually killed the plants by doing it incorrectly. While he was able to vacuum the pool he eventually burned up the vacuum. If he was not supervised he would cut the grass too short.

Mrs. Cardenas believed that despite the relative improvement, Valdez could not be left alone as of the time he left them. He improved his outlook, his ability to care for himself, and in his ability to do chores, but had to be reminded of simple tasks. For instance, he had to be reminded to take a bath and to take his medicine.

Dr. Michael Howard was qualified by the Court as an expert in the field of "counseling psychology." He related that his entire work history was in the field of treatment of brain injury victims and it was in that expertise that he was asked to examine Valdez and render an opinion as to his condition.

Dr. Howard examined Valdez for the purposes of this litigation on two occasions. These examinations were on consecutive days in February, 1994, and encompassed about

twelve hours of examinations each day while Valdez was living at the Cardenas household.

Dr. Howard's aim was to determine if Valdez had cognitive or emotional deficits as a result of the accident and in connection with that, reviewed all of Valdez's medical records as well as the records of Dr. Lerner. Additionally, Dr. Howard performed a battery of tests on Valdez.

Dr. Howard found that Valdez had suffered a significant functional impairment and functioned at the ten to eleven-year-old age level. His intelligence quotient was in the mental retardation range.

Dr. Howard found that Valdez was severely impaired or at best borderline in seven of the eight tests administered including his cognitive abilities, vocabulary skills, auditory language skills and reading comprehension. This compares to a pre-injury ability which Dr. Howard considers to be average, that is, the tenth to twelfth-grade level.

These deficits lead Dr. Howard to believe Valdez incapable of independent living. While Valdez may improve in some respects in the next two or three years, Dr. Howard believes him to have reached maximum improvement and will never achieve independence.

Dr. Howard believes that this case must be in a structured setting. While he admitted that Valdez could look after himself for brief periods of time, much as a "latch-key" child might, just as with a ten-year-old latch-key child, he could not live on his own.

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As to whether this structured setting must be an institution such an the Living Center or some other type of care, Dr. Howard offered that the history of treatment of Valdez indicates that he is capable of some community mobility and that an out-patient program might be viable. In fact, Dr. Howard believes that Valdez would qualify for an out-patient program which he would agree to establish. However, Dr. Howard defines such an out-patient program as one in which out-patient care is provided Valdez from a structured residential environment.

Dr. Eduardo Maaba was qualified by the Court as an expert in the field of forensic psychiatry. He examined Valdez in June, 1994 for the purpose of rendering an opinion in this litigation. After performing a physical and mental examination and reviewing all of the medical records pertaining to Valdez's treatment, Dr. Maaba made several specific findings in regards to Valdez's future care.

Dr. Maaba found that Valdez has significant residual problems cognitive in nature, as well as deficits in memory, speech, attention, problem solving abilities, language, and self-esteem. All of these are chronic, that is, permanent in nature. Dr. Maaba had the opportunity to briefly examine Valdez the day before his testimony and found no improvement in his mental condition. He believes that Valdez has the mental ability of an eight or nine year old child.

Dr. Maaba believes that Valdez's condition requires comprehensive, long-term residential treatment and without proper care would become depressed and suicidal. He bases this conclusion on the fact that Valdez suffers from low

self-esteem stemming from his inability to be productive. Dr. Maaba stressed that without proper care Valdez would regress.

While Dr. Maaba believed that out-patient care might be possible for Valdez, he stressed the importance of a team of professionals, including a neuro-psychologist, a speech therapist, an occupational therapist, and a social worker. Dr. Maaba also expressed concern that proper supervision could be provided with home treatment in view of the extent of the treatment necessary.

Also rendering an opinion based on an examination of Valdez for the purpose of this litigation was Dr. Euginio Alcazaren. Qualified in the field of physiatry with particular experience in physical medicine and rehabilitation, Dr. Alcazaren examined Valdez in July of 1995.

After an examination and a review of the medical records, Dr. Alcazaren diagnosed residual cognizant deficits due to the fatty embolism suffered by Valdez. Dr. Alcazaren found that Valdez suffered from functional impairments in his ability to live independently and employability and was the equivalent of an eight or nine-year-old in terms of short-term memory.

As a result, Dr. Alcazaren opined that Valdez needs a structured setting, particularly a residential supervised facility with vocational pursuits. He also believes that Valdez's condition is permanent and will never improve.

After visiting the Living Center and reviewing its accommodations, Dr. Alcazaren offered that he believes

Valdez to be in the appropriate place for his treatment and if withdrawn from such treatment would be at risk for degeneration. He believes it possible that Valdez would vegetate and lose all functional ability, suffer emotional problems including depression, and would eventually need hospitalization in a psychiatric facility.

Believing that Valdez's cognitive condition has "plateau'd," Dr. Alcazaren stressed that any future care is management care rather than therapeutic. Valdez's condition will not improve and therapy will only prevent him from regressing. However, he was adamant that Valdez's deficits would become worse if he did not receive residential treatment. He believes that Valdez is doing only as well as he is doing because of the structured setting.

The Defendants argue that in-patient care is unnecessary and they presented the testimony of several medical professionals in support of that position. For instance, Dr. William Burke saw Valdez for the purpose of rendering an opinion in connection with this litigation on their behalf. He was qualified as an expert in the field of "brain injury rehabilitation" based in part on his experience as a clinical director of a facility devoted to that function in Florida.

Dr. Burke examined Valdez in June of 1994 and then again in March of 1995 at the Living Center. He reviewed the medical records of Valdez's treatment and did a mental status examination and cognitive evaluation.

Hie testimony contrasts greatly with that of the physicians called on Valdez's behalf. Dr. Burke found that Valdez's

physical functions, gross attention, language skills, social skills, pragmatic skills, and short-term memory were all within normal limits. While Valdez had some problem processing information, Dr. Burke believed him to be independent in self-care, money management, food preparation, and, although Valdez possessed some physical impairment from his injuries and was slow, was not incapacitated.

Mr. Burke reviewed the records of the Living Center and believed them to be supportive of his findings as to Valdez's capabilities. He believes Valdez to be able to initiate tasks and to return to tasks when interrupted. He does not believe that Valdez's safety is a problem and that his ability to interact socially is good. Because of these findings, Dr. Burke believes that Valdez requires some assistance with higher cognitive skills, will require continued structure and supervision, but that he can be improved and with help become independent.

Dr. Burke believes that Valdez requires no further rehabilitation but, rather, some continued cognitive therapy. He has supervised individuals with brain injuries in apartment living who are overseen by a specialist and Valdez would be a candidate for such a program. He believes that Valdez is actually in such a setting at the Living Center.

Mr. Burke believes that Valdez should be repatriated to the Philippines for treatment there and gives several reasons. He suggests that he reaches such a conclusion based on the language problems experienced by Valdez, the presence of his family in the Philippines, and what he believes to be Valdez's preference.

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Donna Roberts, an occupational therapist, testified on behalf of the Defendants by deposition. She worked at the Community Re-Entry Center for three years and evaluates and trains individuals to care for themselves and to achieve independence. Much of her work has been in head injury programs and with cerebral vascular accidents as well as in nursing homes.

Miss Roberts saw Valdez in September, 1993 at the Community Re-Entry Center and performed a two-week evaluation in connection with her job. She complained of a significant language barrier between she and Valdez and concluded that treatment would be facilitated in Valdez's native language.

However, she was able to make several specific findings and conclusions regarding Valdez's condition. She testified that she believes Valdez incapable of functioning without a structured environment. In fact, Valdez was discharged with the recommendation that he live in a supportive environment.

Miss Roberts found Valdez to be able to function only on an hour-to-hour schedule and had to have a written schedule provided for him. He had difficulty carrying out multi-step and complex commands and his slow ambulation speed affected his safety awareness. She noted that functional capacities often start returning six months after a brain injury and begin fine tuning after a year, although the injury itself may be permanent. However, she admitted that this would not have been the case for Valdez if living in a home environment.

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Linda Motte is a rehabilitation nurse at the Community Re-Entry Center and in that capacity coordinated the services for Valdez at that facility. She was his treatment case manager.

Miss Motte described the goal of the Re-Entry Center as that of getting individuals to the highest level of independent functioning so that he may live in the least restrictive environment. By the time of Valdez's discharge from that facility in December, 1993, she believed Valdez had received all of the benefits he was going to obtain from living there.

One significant aspect of the discharge of Valdez from that facility was a question as to whether his communicative deficits were cognitive problems or problems with the English language. As a result, that facility recommended that Valdez be evaluated in his native language.

Miss Motte believed Valdez could function outside of a facility even if his deficits were cognitive and that if he were to live with his family he would not need occupational therapy. Any further treatment, such as cognitive remediation, could be done on an out-patient basis and there was no further need for in-patient care.

Of particular relevance to this testimony is that of Mrs. Cardenas. She took charge of Valdez immediately upon his release from the Re-Entry Center and while the Defendants suggest that the records of treatment at that facility indicate that Valdez was immediately able to re-enter the community, her testimony indicates that he was little more than a zombie.

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The Defendants have sought to establish two points through the medical evidence. They urge that the residual deficits suffered by the Plaintiff are not necessarily cognitive deficits but, rather, language-based. They have repeatedly stressed the significance of the fact that most of the medical personnel who have treated Valdez do not speak his native dialect.

Secondly, the Defendants have attempted to establish the measure of damages for future care based on returning Valdez to his mother's home in the Philippines and on the costs of home-care in that country. In effect, they attempt to have this Court compel Valdez's repatriation to the Philippines.

However, the evidence clearly negates any indication that the extent of the Plaintiff's injuries and the measure of compensation therefor is the result of language differences rather than cognitive defects. In addition to the introduction of ample evidence to establish the ability of those medical professionals and care-givers to adequately communicate with Valdez, there was an abundance of evidence establishing that language is not a factor in their diagnosis of Valdez's mental condition.

For instance, Dr. Maaba testified that he communicated with Valdez in Valdez's native dialect, the main Filipino dialect, and English. Dr. Maaba insists that any problems in communicating with Valdez were not language-based but were due to Valdez's short attention span and cognitive deficiencies.

Additionally, the Defendants would have this Court enforce the contract by which Valdez was employed by them.

They urge that it is not a contract of adhesion and its provisions should be applied against the Plaintiff to require litigation of his claims in the Philippines. While they argue that the Plaintiff's injuries should be minimized because the supposed cognitive defects diagnosed by the various doctors is, in realty, a language barrier, the employment contract itself is written in two languages — Norwegian and English. A notarized affidavit signed by Valdez in Manila in connection with that contract is written entirely in English.

The irony of this argument cannot be overemphasized in the context of the defense offered in this matter. Again, at the same time the Defendants argue that Valdez's injuries are not an serious as suggested because his communicative problems are based on his inability to speak English,[5] they urge that this contract, which is written in English and Norwegian, is not a contract of adhesion and Valdez should be bound by its terms. The Defendants' argument in this regard brings to mind phrases such as "fair play and substantial justice" which they argue to the Court in a different context.

Additionally, the official transcript of Valdez's college courses which is in evidence in this matter in written entirely in English. It indicates that Valdez had passing grades in courses such as "Business English and Technical Report Writing", and "Grammar and Comp with Speech" 111, and 121, as courses in the English department. Valdez graduated with a two-year degree in Engineering leading to the title of ASSOCIATE IN MARINE ENGINEERING.

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5. There is no evidence nor suggestion in argument in this matter that the Plaintiff speaks Norwegian.

Finally, Valdez's mother offered particularly compelling testimony of this issue. She related that she has spoken to her son on the telephone several times since his accident and that his voice sounded different. Additionally, she explained that she received over twenty letters from her son while he was in college and several since his accident. Before his accident she describes the letters as being well-written without misspelled words. Since the accident the letters contain misspellings and other errors.

Language is not an issue. The Plaintiff has established that he was taught and spoke English throughout his fourteen years of school and his deficits are not language based. That fact and the other evidence indicate that Valdez's deficits are, instead, directly related to the injuries resulting from his accident.

The Plaintiff has submitted extensive evidence on the inadequacy of health care in the Philippines in an effort to establish the measure of costs of future care, the second major issue raised by the Defendants. In *Sosa v. M/V Lago Izabal*, 736 F.2d 1028 (5th Cir.1984) and *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir.1988), the courts dealt with the issue of whether the cost of medical care should be determined based on cost in the injured seaman's native country or of that in the United States.

While the court in *Sosa* ruled that the court could properly determine the award of future medical expenses by American standards upon a showing that the seaman would not receive adequate medical care in his home country, the *Hernandez* court required no such showing. In *Hernandez* the

determination of future medical expenses was properly based on American standards and cost upon a mere showing that the seaman was receiving care in this country pending the trial and was likely to remain. The *Hernandez* court rejected the *Sosa* element of inadequacy and held that the determination was a finding of fact to be made on a case-by-case basis.

This is the most difficult aspect of this litigation. While the Plaintiff testified that he wished to remain where he is, there is ample evidence from which a conclusion may be drawn that he will eventually reunite with his family. On the other hand, this Court may not render a judgment based on conjecture as to what life choices a party may make after leaving court.

What the evidence does establish is that the Plaintiff is presently receiving exemplary medical care of a type which is essential to maintain his well-being. While the Defendants have sought to establish the adequacy of medical care in the Philippines, there is no evidence that he will even receive such care if relocated.

The Plaintiff undertook significant efforts to support their argument that medical care in the Philippines such as is required by Valdez is inadequate. Several of the American-based medical witnesses were flown to the Philippines for a personal evaluation of the medical care available. Additionally, several medical experts from the Philippines were produced in this Court for an explanation of the care available.

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For instance, Dr. Alcazaren returned to the Philippines to investigate the availability of facilities such as he believes are needed for Valdez's future treatment. He found no long-term, brain-care residential facilities in the Philippines such as he believes Valdez to require. In fact, he met Dr. Howard in the Philippines and they undertook that search together.

Dr. Alcazaren also considered the issue of home-care in the Philippines. He found that Valdez's mother's home had no electricity, running water, or telephone and would absolutely not be an appropriate setting. Even if a new home were built for Valdez, he offered, the types of home-care treatment available would not be compatible to what he is receiving now.

Dr. Alcazaren admitted that there were in-patient facilities in the Philippines for brain injury victims, and there were private-duty nurses which would be competent to provide home-care services to Valdez if adequately trained. However, he expressed concern about the absence of "on-site" professionals in the residential facilities and described a cultural tradition in the Philippines by which people prefer to treat family members at home rather than in facilities.

Dr. Howard agreed with Dr. Alcazaren. He also testified that, in his opinion, there are no long-term facilities in the Philippines which would afford Valdez the proper environment of treatment.

Mr. Maaba expressed his familiarity with facilities in the Philippines and offered that the only brain-injury facilities

available were for acute injury cases. He offered the opinion that the care Valdez is presently receiving cannot be duplicated in the Philippines. In fact, he testified that Valdez's care would almost have to be out-patient because of the lack of residential facilities, but admitted such care would be feasible if adequate support care could be provided.

Dr. Voogt visited the Philippines and believed there to be no adequate residential facilities. The only facility for treatment of brain injury victims that he found was analogous to a prison. He described it as the type of care provided in this country a hundred years ago.

He disputes that home-care in the Philippines would be appropriate treatment for Valdez. Even if Valdez were provided with therapists and nurses, Dr. Voogt believes that Valdez would only be "baby-sat" and would not enjoy any quality of life.

Finally, the deposition testimony of Valdez's mother was admitted in connection with this trial. Mrs. Valdez is a fifty-four year old widow with a sixth-grade education who lives in an outer province of the Philippines with several of her children. She lives in a home with no electricity, sewerage, or running water and she uses petroleum gas to light the house and firewood to cook.

The photographs of that home are in evidence in this matter. The bathroom indicates a hole in the floor instead of a toilet. The kitchen contains a hole for firewood instead of a stove. Mrs. Valdez explains in her deposition that she retrieves water from a community well for use in the home.

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The only income that Mrs. Valdez has is a small allotment from Valdez's former employer, some income from the sale of coconuts, and occasionally they have a pig big enough to sell. To describe her home and life-style as "third world" is being kind.

To rebut the suggestion that Valdez cannot be properly cared for in the Philippines, the Defendants presented the testimony of Dr. Ofelia Lune-Reyes, a medical doctor in Manila who practices physical medicine and rehabilitation and is the chairperson of the Department of Rehabilitation Medicine at the University of Santo Tomas of Medicine and Surgery. She testified as to the availability and quality of rehab facilities in the Philippines.

Dr. Lune-Reyes offered that there is an increase in the number of psychiatrists who offer rehabilitative services in the Philippines and that there are facilities that offer acute and long-term care to traumatic brain injured persons. However, she admitted that most of the patients in such facilities are stroke victims and there are no long-term residential care facilities in the Philippines for brain injured patients. She confirmed the testimony of Dr. Alcazaren that the Filipino's "take care of their own" and there are no nursing home placements on any type.

Dr. Lune-Reyes insisted that the type of out-patient care that she believes necessary for Valdez is available in the Philippines. She describes how she could oversee a vocational counselor, a care manager, a personal care aid, home care assistants, a psychiatrist, and speech and cognitive therapists. However, she admitted that her clinic is primarily focused

on physical rehabilitation and not the treatment of brain injury; that there are no extended care facilities in the Philippines because most Filipino's cannot afford that type of care; and that she has no knowledge of Valdez's home and whether he would be better off there or in the United States. However, she still insisted that Valdez should be cared for by his family.

This evidence establishes that there is a serious question as to the adequacy of the care available to Valdez in the Philippines both in terms of the type of care available and whether Valdez would even receive what may be available. There is no question that there is no type of long-term residential facility available to Valdez in the Philippines. Assuming Valdez may be adequately cared for on an out-patient basis, the evidence leaves the Court with a grave doubt that it would be administered properly.

The Defendants raise the question of Valdez's right to remain in this country as a non-naturalized alien. Whether he can legally remain in this country has not been established. However, the evidence does establish his desire to remain in this country and the likelihood that he will do so if possible.[6]

The Plaintiff has established that the costs associated with his future care should be based on those costs in the United

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6. The Defendants urged that the Plaintiff would certainly choose to return to the Philippines but for the influence of his attorneys, guardian, and residential care-provider. However, a Filipino witnesses at trial, when asked by the Court somewhat rhetorically if they had ever heard of anyone immigrating from the United States to the Philippines, resoundingly answered in the negative.

States. Because of the question of the quality of care, the lack of assurance that it would be adequately provided him in his relative's environment, and the fact that he has received all of his medical care from the date of his injury to the time of trial in this country, the Court is convinced that the rationale of *Sosa* and *Hernandez* mandate such a determination.

The Court is not convinced, however, that the costs of such care has been established to be the costs of the residential setting within which the Plaintiff now is treated. The evidence establishes that the proper measure of cost associated with the Plaintiff's future care can be determined by less intensive care. There are several specific points of evidence which convince the Court of that fact.

Dr. Voogt described the goal of his facility as intended to return a patient to the least restrictive environment possible and to their own community and family if possible. That was consistent with his testimony that the average patient remained at his facility for eighteen months to two years.

He admitted that Valdez has reached most of the goals set for him, including the development of vocational skills. Valdez is independent in terms of his hygiene and following a daily schedule and does not need intensive therapy, only receiving three and a half hours of attention per week at the Living Center.

Most importantly, Dr. Voogt admitted that the medical and therapeutic care needed by Valdez could be provided in a home setting — it is the amount of structure which would be lacking. There is the main reason for Dr. Voogt's opinion that residential care is essential.

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The subject of structure in a home environment was addressed by Dr. Howard. He was in total agreement with Dr. Voogt's conclusions about Valdez's condition, including the fact that he has significant functional impairment and is incapable of independent living. He agreed that Valdez required a structured setting but offered that the history of Valdez's treatment indicates that an out-patient program might be viable. He offered to establish such a program.

Dr. Maaba agreed that out-patient care might be possible with his only reservation being that a team of professionals was essential. As with the other doctors, Dr. Maaba felt that providing the proper amount of structure and supervision in a home setting was the key to the success of such a program.

While Dr. Burke believes Valdez capable of independent living and would have him cared for by his mother, his opinions do not assist the Court. His findings concerning Valdez's condition are based on an abbreviated examination and vary so greatly with all the other medical evidence in this matter so as to diminish their worth in this controversy.

On the whole, the Court cannot envision that Valdez will either benefit from spending the rest of his life in, and nor will he actually remain in the Living Center, even if damages are awarded on that basis. Valdez has received all of the benefit possible from that program and can be adequately maintained in a home with out-patient care.

That is not to say that the environment in the Living Center is not conducive to Valdez's well-being. Quite the contrary, the Court agrees that the ideal situation would be

for Valdez to spend the rest of his life in the Living Center. However, making the Defendants pay for such an intensive system of care is not mandated by the medical evidence.

The Court has determined the cost of future care based on the testimony of the various witnesses as to the need for and the cost of a home where a team of professionals are available to constantly monitor and assist the Plaintiff on a daily basis. Because of the Plaintiff's condition, as described by the various witnesses but also as observed by the Court during his testimony, the only way that Valdez can live outside of a residential facility is if he is cared for around-the-clock. The cost of his care must necessarily include twenty-four hour nursing care.

The actual demeanor of the Plaintiff is a matter of great significance in the Court's determination. The Court observed that what was apparently an energetic, intelligent and ambitious young man is now a dull, slow and almost pathetic invalid. Valdez moved and walked with the slow and unsure gait of one obviously suffering significant impairment. It is this fact as much as any of the testimony or documentary evidence which convinces the Court that this man can never live on his own.

As a result, the Court has awarded general damages commiserate with Valdez's injuries; an award of expenses for future medical care associated with the cost of home care in the United States; and lost wages and found. The Court will describe how each of those sums were arrived at.

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GENERAL DAMAGES

In additional to the catastrophic injury to Valdez's mind, he suffered very serious physical injuries as well. As mentioned, both legs were broken and he underwent a course of surgery and treatment for those injuries.

The devastating effect of the mental injuries on Valdez have been discussed in detail hereinabove. However, Valdez has also suffered other residual physical problems from his leg injuries. He has suffered severe scarring as a result of his surgery and one leg is now shorter then the other. Valdez will have permanent functional impairments in mobility as a result.

The Plaintiff refers the Court to several reported cases which are suggested guides in the determination of the appropriate general damage award in this matter. A review of appellant cases dealing with an analysis of damage awards with similar facts is helpful in making a determination of the proper quantum of damages in this matter. While this court is not bound by prior judgments or appellate decisions, a review of those cases indicate a great disparity in the range of possible awards depending on the severity of the injuries and related physical impairment. However, they are helpful in the Court's determination in this matter.

For instance, the Plaintiff directs the Court to *Sharkey v. Sterling Drug, Inc.*, 600 So.2d 701 (La.App.1 Cir.1992) wherein a general damage award of $4,000,000.00 was reduced to $2,500,000.00 by the First Circuit for a twelve-year-old child who suffered catastrophic brain injury

as a result of the ingestion of aspirin and the onset of Reyes Syndrome. She was classified as moderately retarded with a mental age of a five or six-year-old which was accompanied by loss of motor function and coordination. Her speech was largely unintelligible and her chances for improvement was very limited.

The Plaintiff refers the Court to *Simpson v. State Through DOTD*, 636 So.2d 608 (La.App.1 Cir.1993), wherein a trial award of $6,000,000.00 was upheld for a 15-year-old boy who suffered a severe head injury which resulted in emotional and psychological problems as well as decreased attention span, memory, perceptual motor function, impulse control, abstract thinking, learning potential, fine motor control, dexterity, and pain tolerance. However, the mental injuries described were also accompanied by the traumatic amputation of both legs.

The Court has considered reported cases indicating a broad range of damage awards for brain injury victims. In *Chamberlain v. State, Through DOTD*, CA-91-1942R (La.App.1 Cir, 3/11/94); 633 So.2d 871, a general damage award of $2,000,000.00 was upheld for the near-drowning of a 17-year-old who was in a vegetative state and unable to move on his own, with the mental capacity of a two-week-old infant.

In *Pino v. Gauthier*, 633 So.2d 638 (La.App. 1 Cir. 1993), a 19-year-old woman was rendered comatose as a result of serious head injuries occasioned by an automobile accident and, thereafter, suffered a significant decrease in her learning range, had behavioral problems, and needed 24-hour supervision. She was awarded $1,000,000.00.

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A careful review of the analysis performed in each of those matters, and of the facts of this case, lead the Court to the conclusion that an appropriate general damage award in this matter is $1,500,000.00. This takes into account the various items of general damages which are applicable to this claim.

For instance, the Court has taken into consideration and has awarded this sum based on the physical pain and suffering occasioned by Valdez's accident. The Court notes that Valdez has certainly suffered less from a physical standpoint then the plaintiff in *Simpson* who suffered a traumatic double amputation.

On the other hand, because the Plaintiff can remember his past accomplishments, including obtaining an associate degree and beginning a job with chances for advancement, and can comprehend his new-found deficiencies, he has suffered greater emotional and mental anguish then the *Chamberlain* plaintiff who was in a vegetative state.

The Court has also considered the fact of the Plaintiff's permanent disability, the relatively minor disfigurement to his body, and the loss of enjoyment of life he has suffered. While not as catastrophic an injury as can be found in the reported cases, Valdez has suffered profoundly. Thus, the Court has determined this sum to be an appropriate sum to compensate the Plaintiff for his general damages.

MEDICAL CARE

The Plaintiff argues that his future economic damages in terms of the costs of his care and other medical expenses has

been established to be approximately $6,300,000.00. He points to the testimony of Dr. Randy Rice who calculated the future costs based on the costs associated with the Living Center, as established by Dr. Voogt.

However, this is not the proper measure of that cost. That measure is somewhat less based on what it would take to establish a home for Valdez with around-the-clock nursing care. Dr. Burke testified, for instance, that the cost of boarding and care management would be approximately $2,400.00 per month. Added to that must be the cost of nursing care and the therapists necessary for Valdez's continued care. Dr. Rice offered a determination of the present value of the future health care costs on the basis of both residential care and a private home setting.

Dr. Rice was asked by Plaintiff's counsel to calculate the present value of care costing $46,000.00 per year. Dr. Rice used the same analysis he performed as reported in *Sharkey* which this Court finds to be reasonable and in accordance with the evidence. He concluded that the present value of that care for Valdez's life expectancy would be $2,134,400.00.

However, the yearly figure of $46,000.00 is not an accurate estimation of the total costs of providing home care necessary to maintain Valdez's medical condition. The Court accepts the estimation by Dr. Burke as to the cost of maintaining a facility and case manager. Added to that figure would be the cost of nursing care and therapists. The evidence does not support the proposition that these additional costs, especially around-the-clock nursing care, can be provided for an additional $17,200.00.

Appendix B

In *Sharkey*, the trial court awarded a mid-range figure between the costs associated with residential and home care because of the nature of the determination of future costs. "[A]n award of future medical expenses is in great measure highly speculative and not susceptible of calculation with mathematical certainty." *Young v. Armatures D. Cabotage, S.A.*, 617 So.2d 517, 540 (La.App.4 Cir.1993). Once the need and approximate costs of such care is established by the Plaintiff with some degree of certainty, an award is justified.

Because the evidence establishes the approximate costs of home care necessary by Valdez, and the Court accepts the methodology of Dr. Rice in terms of his discount rate, estimate as to the rate of inflation involving medical expenses, and the Plaintiff's projected life expectancy, the Court has awarded $3,000,000.00 for the Plaintiff's future medical care.

WAGES

The testimony of Dr. Rice and his conclusions based on the evidence admitted at this trial establish that the Plaintiff has suffered a past and future loss of earnings, earning potential, and found. While some of Dr. Rice's conclusions are rejected by the Court, his computations provide a basis for the determination of the proper figures in this matter.

There is little dispute as to the wage loss as of the time of trial. That figure has been established to be $18,592.00.

As to future wage loss, Dr. Rice initially computed the future loss of income assuming a work-life expectancy to age 65 instead of the more realistic age of 58. On the other

hand, the Defendants offered the testimony of Dr. Kenneth Boudreaux, who based his wage-loss figures on a 30% income tax rate.

The present status of the law in this circuit is indeterminate as to whether future wage loss should be computed on pre-tax income. See *Daugherty v. Cross Marine, Inc.*, 598 So.2d 595 (La.App.4 Cir.1992); *Scamardo v. New Orleans Stevedoring Co.*, 595 So.2d 1242 (La.App.4 Cir.1992). Compare these matters to *Gaston v. G & D Marine Services, Inc.*, 93-CA-0182 (La.App.4 Cir, 1/19/94) 631 So.2d 547. See also *Marcel v. Placid Oil Co.*, 11 F.3d 563 (5th Cir.1994). However, the Plaintiff has directed the Court to judicial notice of Filipino tax rates indicating that Valdez would not be subject to income tax. Thus, the Court has decided to award future earnings based on Valdez's gross earnings.

The testimony convinces the Court that, based on the shorter life expectancy; ten months of work per year; and a 3% discount rate, Valdez has suffered a future wage loss and loss of earning potential of $374,747.00. That amount has been awarded.

A maritime plaintiff is entitled to be compensated for "found", which is the value of his living expenses provided by his employer as a condition of his employment aboard a ship. Valdez was provided food, lodging, and other expenses occasioned by the nature of his employment, specifically, nine months of continuous service aboard the ship. Because Valdez will never again work aboard a ship, he has suffered

a loss of found. See *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993).[7]

The Plaintiff has established his entitlement to a specific amount of found lost as a result of his disability both up to the time of trial and into the future. Dr. Rice testified that, given a daily rate of $18.00 for that item of compensation, and assuming that Valdez worked 300 days per year, he suffered a past loss of $12,235.00, and a future loss of $136,989.00. Those sums have been awarded herein.

INTEREST

The award of damages herein is based on the unseaworthiness of the vessel rather than on negligence. Thus, the Court has followed the rationale of the decisions of cases such as *O'Bryan v. Folk Const. Co.*, 594 So.2d 900 (La.App.4 Cir.1991), and *Mistich*, supra, in determining that an apportionment of the general damages between past and future loss is appropriate for the determination of computation of interest. Interest is to run only on that portion of damages assessed from the date of the Plaintiff's accident until paid and from the date of judgment on the remainder.

Because of the Plaintiff's young age at the time of his injury and the permanent nature of his injuries, the Court has

---

7. While the Defendants argue that found is the value of meals and lodging which the seaman will incur while on land and is not recoverable if he receives these items from some other source, the Supreme Court clearly held in *Youn*, at 1261: "Plaintiff clearly suffered this loss, inasmuch as he will never again receive these sums from his employer while aboard ship."

determined that 80% of his general damage award is for his future suffering. As a result, pre-judgment interest is awarded on 20% of the general damage award only, with legal interest to run on the remainder only from the date of this judgment until paid.

PARTIES DEFENDANT

Finally, the Defendants have raised the issue in memorandum as to the proper parties against whom judgment may be rendered. They suggest that only K/S Smedvig Tankers V is properly before the Court as the owner of the ship attached in this matter. When an action against a non-resident is commenced by the attachment of the nonresident's property in this state, the judgment may be executed only against that property. *Alessi v. Belanger*, CA-93-2047 (La.App.1 Cir, 10/7/94) 644 So.2d 778.

When the owner of the property secures the release of the property under the authority of La.C.C.Pro. art. 3507 by furnishing security for the satisfaction of any judgment which may be rendered against them, it necessarily follows that the surety becomes liable and judgment may be executed against them. The parties in this matter have made reference in memorandum and pleadings that security has been provided in the sum of $10,000,000.00.

However, there is no pleading filed in this record nor exhibit introduced at trial which would establish exactly who provided that security. While the Court has determined that a management firm, ASSURANCEFORENINGEN GARD, may be the entity which actually provided security, such fact

is not established by evidence or stipulation. Additionally, the named Defendants in this matter have made a collective appearance up to and including in post-trial memorandum. Therefore, judgment has been rendered against the named Defendants on the assumption that they are the surety for the release of the vessel from the non-resident attachment.

Judgment has been rendered herein in accordance with these reasons. Pointe-a-la-Hache, Louisiana, this 31st day of January, 1996.

s/ [illegible]
JUDGE

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DENYING WRIT OF CERTIORARI DATED JANUARY 15, 1999

The Supreme Court of the State of Louisiana

NO. 98-C – 2608

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VS.

SMEDVIG TANKSHIPS, LTD., ET AL

IN RE: Smedvig Tankships Ltd.; Smedvig Tankships Managmnt.Ltd; Smedvig Tankships A.S. a/k/a; Smedvig Tankrederi A.S.; Smedvig, Peder A.S.; Peder Smedvig SingaporePte Ltd; K.S. Smedvig Tankers V; K.S. Smedvig Tankers VI; — Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 38-719; to the Court of Appeal, Fourth Circuit, Number 96CA-1013.

January 15, 1999

Denied.

PFC

WFM

HTL

CDK

Appendix C

JOHNSON, J. not on panel.

VICTORY, J. would grant the writ.

TRAYLOR, J. would grant the writ.

KNOLL, J. would grant the writ.

Supreme Court of Louisiana
January 15, 1999

s/ [illegible]
Clerk of Court
For the Court

APPENDIX D — PHILIPPINE EMPLOYMENT CONTRACT DATED FEBRUARY 10, 1993

SUBJECT TO THE TERMS AND CONDITIONS OF NIS CBA WHICH IS SUPERIOR TO THE POEA STANDARD CONTRACT.

DEPARTED MAR 23 1993

Republic of the Philippines
Department of Labor and Employment
PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION

CONTRACT OF EMPLOYMENT

KNOW ALL MEN BY THESE PRESENTS:

This Contract, entered into voluntarily by and between:

Name of Seafarer: CARLOS VALDEZ JR.
Address: COLONIA LAMITAN BASILAN PROVINCE
SSRB No: B178928 SRC No.: B-222934

* * *

hereinafter referred to as the Employee

and

Name of Agent: SINGA SHIP MANAGEMENT PHILS., INC.
For and in behalf of PEDER SMEDVIG SINGAPORE PTE., LTD. (Principal/Country)

Appendix D

for the following vessel
Name of Vessel: MT VESTRI
Official Number: TBA
Gross Registered Tonnage (GRT) 49071
Flag: NIS Year Built: 1980
Classification Society: ABS
hereinafter referred to as the Employer.

WITNESSETH

1. That the Employee shall be employed on board under the following terms and conditions:

   1.1 Duration of Contract: 10 MONTHS
   1.2 Position: ENGINE CADET
   1.3 Basic Monthly Salary: USD214.00/MONTH
   1.4 Hours of Work: 44HRS./WEEK
   1.5 Overtime: USD118.00 FIXED OT/MONTH
   1.6 Vacation Leave with Pay: USD43.00/MONTH

2. The terms and conditions of the revised Employment Contract for seafarers governing the employment of all Filipino seafarers approved by the POEA/Dole on July 14, 1989 under Memorandum Circular No. 41 series of 1989 and amending circulars relative thereto shall be strictly and faithfully observed.

3. Any alterations or changes, in any part of this Contract shall be evaluated, verified, processed and approved by the Philippine Overseas Employment Administration (POEA). Upon approval, the same shall be deemed an integral part of the Standard Employment Contract (SEC) for seafarers.

Appendix D

4. All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established Grievance Machinery in the Revised Employment Contract for seafarers, the adjudication procedures of the Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order.

5. Violations of the terms and conditions of this Contract with its approved addendum shall warrant the imposition of appropriate disciplinary or administrative sanctions against the erring party.

IN WITNESS WHEREOF, the parties have hereto set their hands this 10th day of FEB. 1993 at MAKATI Philippines.

s/ Carlos Valdez, Jr.	s/ Conrado V. Garcia
CARLOS VALDEZ JR.	CONRADO V. GARCIA
Seafarer	For the Employer

Verified and approved by the POEA:

* * *

[stamp]
PRE-EMPLOYMENT
SERVICES OFFICE
POEA
CONTRACT APPROVED
BY s/ [illegible]
DATE FEB 15 1993
Signature of POEA Official

APPENDIX E — NORWEGIAN EMPLOYMENT CONTRACT DATED MARCH 17, 1993

ANSETTELSESAVTALE/*EMPLOYMENT AGREEMENT*

(Jf sjemannslov av 30.5.75 §3 med forskrifter) *(According to Seaman's act of 30 May 1975 § 3 with regulations)*

* * *

2 ☒ Ny/*New*

* * *

Avtalen gjelder fra dato/*The agreement applies from date*
EMBARKATION

3 Fodselsnr/*Birth no*
05.08.70.

4 Etternavn/*Surname*
VALDEZ JR.

5 For – og mellomnavn/*First and middle name(s)*
CARLOS GOLVEO

6 Nasjonalitet/*Nationality*
FILIPINO

7 Hjemmeadresse/*Home address*
COLONIA LAMITAN,BASILAN PROVINCE,PHILS.

* * *

Appendix E

8 Naermeste parorende – navn og adresse/*Name and address of next of kin*
MRS. EDITHA G. VALDEZ(MOTHER) – same as above

* * *

9 Arbeidsgiver – navn og adresse/*Name and address of employer*
PEDER SMEDVIG SINGAPORE PTE.,LTD.
1 SHENTON WAY,HEX 23-01
ROBINA HOUSE,SINGAPORE 1 0106

Arbeidsgivernr/*Employer's reg. number*
51842359 000

10 Hyre/overtidsbetaling og andre vikar etter overenskomst mellom/*Wages, overtime pay and other conditions according to collective agreement between*
ASO *and* AMOSUP
BASIC: USD 214.00/MONTH
O/TIME: USD 118.00/MONTH

11 Spesielle vikar/andre opplysninger. Herunder opplysninger om begrensning i tjenesteplikt/*Special conditions/other information including information concerning limitation of duty service*

Direktoratet for sjomenn/*Directorate for Seamen*

This contract is deemed a contract under Norwegian law and jurisdiction and the venue of Norwegian

court. Any legal action the seaman may take against the shipowner concerning his service onboard the vessel, shall as the seaman may choose, be settled either by the courts in Norway or by the courts in the Republic of the Philippines.

VESSEL PARTICULARS:
PORT OF REGISTRY: STAVANGER
CALL LETTERS: LASZ 2
GROSS TONNAGE: 49,071
OWNERS: K/S SMEDVIG TANKERS V
c/o PEDER SMEDVIG A/S
P.O.BOX 110,N-4001
STAVANGER,NORWAY

Status of Seaman: SINGLE

12 Stilling/*Rank/Rating*
ENGINE CADET/ALTERNATE

13 Hyre fra og med/*Wages from and incl.*
MAR 23 1993

* * *

15 Provetid/*Probationary period*
3 months

* * *

Appendix E

Utfylles bare ved midlertidig ansettelse
To be completed only in cases of temporary employment

17 Fartoyets navn/*Name of vessel*
M.T. VESTRI

* * *

19 *En bestemt reise og eventuell varighet/One specified voyage and possible duration*
N.A.

20 Avloser for/*Relief for*
N.A.

21 Arbeid av forbigaende varighet/*Temporary employment*
N.A.

22 Ansettelsesavtalen inngatt – sted og dato/*The employment agreement signed – place and date*

s/ Conrado V. Garcia
CAPT. KENNETH MCKENZIE
General Manager
For arbeidsgiver/*On behalf of employer*

CARLOS G. VALDEZ JR.
s/ Carlos Valdez, Jr.
Arbeidstakers underskrift/*Employee's signature*

Appendix E

23 Forevist/*Presented*
MANILA 17 MAR 1993
Sted og dato/*Place and date*

Stempel/*Stamp*
[stamp]
Kgf Norsk Ambassade
MANIA 336

s/ [illegible]
Monstr. Mynd. Underskrift/
Signature of mustering authority

APPENDIX F — AFFIDAVIT OF PER GUSTAV BLOM DATED NOVEMBER 3, 1994

AFFIDAVIT

My name is Per Gustav Blom. I am currently employed by Smedvig Tankships Limited, Bermuda. On May 26, 1993 I was employed by Peder Smedvig A/S, Stavanger, Norway, as Finance Director. As such, I was familiar with the operations of the M/T Vestri, its ownership, management, base of operations, etc.

On May 26, 1993, M/T VESTRI was owned by K/S Smedvig Tankers V, a limited partnership located in Norway and formed under and pursuant to the laws of Norway. The general partner of K/S Smedvig Tankers V was Smedvig Tankers V A/S, a Norwegian limited liability company with its principal place of business in Stavanger, Norway. The investors in KS Smedvig Tankers V were all Norwegian citizens.

The primary asset of K/S Smedvig Tankers V was the M/T VESTRI. The VESTRI was a Norwegian flag vessel registered with the Norwegian International Shipregister. Her home port was Stavanger, Norway. The M/T VESTRI was owned subject to a ship mortgage held by Chemical Bank Norge AS, which ship mortgage was properly entered in the records of the Norwegian International Ship Register.

In order to handle the management of the vessel, K/S Smedvig Tankers V contracted with Peder Smedvig A/S, a Norwegian company based in Stavanger, Norway. The obligation of the vessel's manager pursuant to its contract, as agreed upon with K/S Smedvig Tankers V, was that Peder Smedvig A/S

Appendix F

Stavanger would handle all the management matters concerning the operations of the vessel. However, crewing services were delegated to Peder Smedvig Singapore Pte. Ltd., a 100% owned subsidiary of Peder Smedvig A/S.

It was from Stavanger, Norway, that the initial arrangements for the financing and purchase of the vessel in 1989 were made. It was from Stavanger, Norway, that Peder Smedvig A/S arranged for the registry of the vessel in the Norwegian International Shipregister and the entry of the vessel with the Norwegian Shipping and Offshore Federation. It was from Stavanger that Peder Smedvig A/S handled the insurance arrangements for the vessel. Liability insurance was placed with a Norwegian based P&I Club, Assuranceforeningen GARD. The leading underwriter for the vessel's hull and machinery insurance was Skadeforsikringsselskapet Vesta AS, a Norwegian insurance company.

All of the day to day decisions concerning the affairs of the M/T VESTRI were handled through the Stavanger office. It was from Stavanger, Norway, that Peder Smedvig A/S arranged for routine and special maintenance items needed for the vessel. Spare parts, and engine room supplies were ordered and paid for from Stavanger. Crew victuals were ordered and paid for from Stavanger. Movement and replacement of crew was directed from Singapore. It was from Stavanger that Peder Smedvig A/S Stavanger arranged for the customary and regular surveyors' inspections of the vessel and for the classification society approval for the vessel (which was through Det Norske Veritas A/S, a Norwegian classification society). The Stavanger office arranged for local

husbanding agents at various ports (if not arranged for by the charterer); arranged for payments to be made on the vessel mortgage; and arranged for reports to be made to Norwegian authorities.

In May 1993, M/T VESTRI was crewed primarily with Filipino seamen who were working pursuant to a negotiated collective bargaining agreement. The vessel was entered with the Norwegian Shipowners Association and as a result were hiring seamen pursuant to a collective bargaining agreement negotiated between the Norwegian Shipping and Offshore Federation and the Philippine seaman's union (AMOSUP).

The actual recruiting of seamen was handled pursuant to a contract between Peder Smedvig A/S and a Singapore company, Peder Smedvig Singapore Pte. Ltd. This company had offices in Singapore and arranged for the hiring of seamen to work as crewmembers through local agents in the Philippines. All the seamen hired through the Philippines for work aboard ships such as M/T VESTRI must sail pursuant to collective bargaining agreements and/or contracts approved by the Philippine Overseas Employment Administration. Compliance with this requirement of the Government of the Republic of the Philippines was delegated to Peder Smedvig Singapore Pte. Ltd. by Peder Smedig A/S. The result was a ship that was crewed primarily by Filipino seamen pursuant to a collective bargaining agreement that had been negotiated between a Philippine seamen's union and the Norwegian Shipping and Offshore Federation, and a collective bargaining agreement that was furthermore approved by the Norwegian International Ship Register.

Appendix F

The individual employment contracts that were signed by the seamen specifically called for the application of Norwegian law and required that legal action be taken either in Norway or the Republic of the Philippines. Copies of Mr Valdez's employment contracts are attached as Exhibit A.

During the period from the purchase of the vessel in 1989 through the time of this accident (26 May 1993), neither Peder Smedvig A/S nor K/S Smedvig Tankers V had any offices in the United States, no bank accounts in the United States, nor agents for service of process in the United States, nor employees regularly stationed in the United States, nor subsidiaries located in the United States. The vessel would call in the United States on occasion at the direction of the charterers, who had the freedom to arrange for the call of the vessel at any suitable port, subject to the terms and provisions of the various charter agreements. The number of times that the M/T VESTRI would call in the United States was purely at the discretion of the particular charterer of the vessel at the time. On May 26, 1993, the M/T VESTRI was under charter to Sun Oil. Throughout, however, the base of operations for all the affairs of the VESTRI was Stavanger, Norway. (A reorganisation of the ownerships of the vessel came into effect on May 29, 1993. At that time the ownerships of M/T VESTRI was transferred to Vestri Shipping Inc., a Liberian corporation 100% owned by Smedvig Tankships Ltd.).

I have attached a Exhibit B the management agreement for the vessel; as Exhibit C the Agreement for Crew Management between Peder Smedvig A/S and Peder Smedvig Singapore

Appendix F

Pte. Ltd.; and as Exhibit D the crew list. The above is true and correct to the best of my knowledge and belief.

3 November 1993

s/ Per Gustav Blom
PER GUSTAV BLOM

NOTARIUS PUBLICUS I STAVAGNER BEKREFTER AT
The Notary Public of Stavanger certifies that
Per Gustav Blom
HAR UNDERTEGNET DETTE DOKUMENT
has/have signed this document.

[seal]

STAVANGER NOTARIALEVBETE

s/ [illegible]
Torbjorn Husbo
Byfogd

APPENDIX G — NORWEGIAN SEAMAN'S ACT

§1

This Act applies to any person who is employed on board a Norwegian ship, and who does not only work on board while the ship is in port.

* * *

§50

If, while the ship is in a foreign country, a dispute arises between the master and any of the crew regarding the settlement of wages, the ship service or the employment relationship in general, the case shall be referred to a Norwegian foreign service station. The dispute shall not be brought before foreign authorities. As regards lawsuits against the shipping company relating to compensation for occupational injuries, they may only be brought before a court of justice in Norway . . . .

* * * *

APPENDIX H — POEA RULES AND EXECUTIVE ORDER NO. 247

SECTION 1, RULE I, BOOK VI OF THE POEA RULES AND REGULATIONS

[The POEA has] original and exclusive jurisdiction to hear and decide all cases involving employer-employee relations arising out of or by virtue of any law or contract involving Philippine workers for overseas employment, including seamen, such as but not limited to . . . money claims of workers against their employers . . . and claims for death, disability and other benefits arising out of employment.

* * * *

Appendix H

EXECUTIVE ORDER NO. 247, REORGANIZATION ACT OF THE PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION [REPUBLIC OF THE PHILIPPINES].

* * *

Section 3. *Powers and Functions.* In the pursuit of its mandate, the [Philippine Overseas Employment] Administration shall have the following powers and functions:

* * *

(b) Formulate and implement, in coordination with appropriate entities concerned, when necessary, a system for promoting and monitoring the overseas employment of Filipino workers taking into consideration their welfare and the domestic manpower requirements;

(c) Exercise original and exclusive jurisdiction to hear and decide all claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas employment including the disciplinary cases. . . .

* * * *

APPENDIX I — PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION STANDARD EMPLOYMENT CONTRACT

Philippine Overseas Employment Administration
Department of Labor and Employment

REVISED STANDARD EMPLOYMENT CONTRACT GOVERNING THE EMPLOYMENT OF ALL FILIPINO SEAMEN ON BOARD OCEAN-GOING VESSELS.

This Revised Standard Employment Contract Governing the Employment of All Filipino Seamen on Board Ocean-going Vessels has been adopted and approved upon the recommendation of a tripartite technical working group and the Seafarer's Consultative Committee following a series of discussions among representatives of manning associations, seamen's organizations, POEA and other government agencies. This contract shall take effect ninety (90) days after this publication.

The terms and conditions provided in this revised employment contract are the minimum requirements acceptable to POEA for the employment of a Filipino seaman overseas. The parties may therefore improve on these minimum terms and conditions but such improvements shall be made in writing and appended to this contract when submitted to POEA for processing and approval.

* * *

Appendix I

Section I
Jurisdiction

The Philippine Overseas Employment Administration (POEA or Administration) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this contract.

Section J
Applicable Law

It is understood and agreed that:

All rights and obligations of the parties to this Contract including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants wherein the Philippines is a signatory.

* * * *

APPENDIX J — NIS COLLECTIVE BARGAINING AGREEMENT

COLLECTIVE BARGAINING AGREEMENT (NIS)

BETWEEN

ASSOCIATED MARINE OFFICERS' AND SEAMAN'S UNION OF THE PHILIPPINES

AND

PEDER SMEDVIG SINGAPORE PTE. LTD.

REPRESENTED BY

SINGA SHIP MANAGEMENT PHILS., INC.

* * *

Article 15
Jurisdiction

The Unions and the ASO have observed that according to the NIS ACT this agreement should be subjected to Norwegian law and the jurisdiction of the courts in Norway.

Cases concerning the seafarer's service on the ship may be brought against the Company before a Norwegian court or before a Court in the seafarer's country of residence.

* * * *

APPENDIX K — NORWEGIAN INTERNATIONAL SHIPREGISTER (NIS) ACT

Act of 12 June 1987 No. 48

* * *

Chapter I. General provisions

Section 1. *Conditions for registration.*

Self-propelled passenger and cargo ships and hovercraft, as well as drilling platforms and other movable installations, may on request be registered in the Norwegian International Ship Register provided:

1. the owner satisfies the nationality conditions in Section 1 of the Maritime Act; or

2. the owner, if he does not satisfy the nationality conditions in Section 1 of the Maritime Act,

    a) is a limited company or a limited partnership with its head office in Norway; or

    b) is a shipowning partnership, with a managing owner who satisfies the provisions relating to managing owners in Chapter 3 of the Maritime Act.

3. the owner, if he does not satisfy the conditions of items 1 or 2, has appointed a representative

who is authorized to accept writs on behalf of the owner. The representative must fulfil the nationally requirements for managing owners as set out in Section 41 of the Maritime Act.

Ships registered in accordance with items 2 or 3 above shall be operated by a Norwegian shipping company with its head office in Norway.

The King may issue regulations allowing for the registration of other vessels and installations.

* * *

Chapter II. Special provisions relating to ships in the Norwegian International Ship Register.

Section 6. *Pay and working conditions.*

Terms of pay and employment and other working conditions on ships in this register are to be fixed in a collective wage agreement which expressly states that it applies to such service. A collective wage agreement which does not so state does not apply to service on ships in this register.

Collective wage agreements may be concluded with Norwegian or foreign trade unions.

The collective wage agreement mentioned in the first paragraph shall expressly state that the agreement is subject to Norwegian laws and Norwegian courts of law. The parties

to the agreement may nevertheless deviate from the provisions in subsections 2 and 33 of Section 5 and Chapter 2-5 of Act no. 1 of 5 May 1927 relating to labor disputes, if the agreement instead of referring to Norwegian courts explicitly provides that disputes concerning the agreement shall be subject to the courts and procedural rules including rules governing arbitration, in another country.

Individual contracts of engagement for service on ships in this register shall expressly state that the contract is subject to Norwegian law and Norwegian courts, but that cases concerning the employee's service on the ship may be brought against the owner before a Norwegian court or before a court in the employee's country of residence.

* * * *

APPENDIX L — TREATY OF FRIENDSHIP, COMMERCE AND CONSULAR RIGHTS BETWEEN THE UNITED STATES AND NORWAY 47 STAT. 2135, JUNE 5, 1928

* * *

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

* * *

The United States of America and the Kingdom of Norway, desirous of strengthening the bond of peace which happily prevails between them, by arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof, have resolved to conclude a Treaty of Friendship, Commerce and Consular Rights and . . . have agreed upon the following Articles:

* * *

ARTICLE X

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * *

Supreme Court, U.S.
FILED
MAY 13 1999
OFFICE OF THE CLERK

No. 98-1673

In The

Supreme Court of the United States

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

Petitioners,

vs.

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Circuit, State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petition misstates the relevant facts.

Petitioners' statement of the case is insufficient, and in many instances, contrary to the evidence before the trial court and the Louisiana Fourth Circuit Court of Appeal. Both courts carefully and diligently reviewed and analyzed the evidence, which consisted of 70 joint exhibits. The evidence included more than 1,000 pages of documents, the testimony of 23 witnesses, 14 testifying for plaintiff (six by deposition), and nine testifying for the defendants (four by deposition).

Respondent is Nestor Abuan, a U.S. citizen. In July of 1993, a Florida court appointed Mr. Abuan as guardian of Carlos Valdez. On May 26, 1993, while working as an engine room cadet aboard the M/T Vestri, Mr. Valdez suffered multiple injuries resulting in permanent brain damage, when a crane in the engine room collapsed and a piston fell on him. He was on a voyage off the Florida coast, in U.S. commercial waters, between Houston, Texas and Philadelphia, Pennsylvania. After the accident, the U.S. Coast Guard airlifted Mr. Valdez to Florida for medical treatment. In October of 1994, pursuant to the recommendation of Mr. Valdez' attending physicians, and pursuant to the order of the probate court in Florida, Mr. Valdez was transferred to the Rehabilitation Living Center in New Orleans, Louisiana, for continuing medical treatment, where Mr. Valdez has resided permanently.

The trial court found that U.S. law was applicable in this litigation. The trial court also found that while forum selection clauses are prima facie valid, the evidence in the instant case established that the forum selection clause

was overreaching and should not be enforced, based upon this Court's decision in *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972). Finally, the trial court found that using U.S. standards was proper in determining future medical care. The appellate court affirmed all these findings, based upon the evidence in the record.

REASONS FOR DENYING THE WRIT

In the instant case, the Louisiana courts decided the legal issues of choice of law and choice of forum in accordance with federal law and federal standards. The standards used by the Louisiana courts do not conflict with the decision of any other state court of last resort or of a United States Court of Appeal nor with any holding of this Court.

A review of the decisions by the Louisiana courts reveals that Petitioners have never argued that the "choice of law" or "choice of forum" criteria utilized by the Louisiana courts conflicted with decisions by this Court or any appellate courts and reveal that Petitioners have only argued that the Louisiana courts erred in the factual conclusions reached in the application of this Court's well-established precedents. The arguments raised by the Petitioners have always been directed at the factual conclusions reached by the Louisiana courts. However, the findings by the Louisiana courts were amply supported by the evidence in this particular case. Petitioners would have this Court violate its holding in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) wherein this Court emphasized the great deference to be

given to the findings of fact of a trial court. Also, it is important for this Court to note that Louisiana appellate courts' scope of review extends to issues of both law and fact and the Louisiana Supreme Court has held that the appellate review of facts extends to maritime cases. *See*: Art. 5, Sects. 5(C) and 10(B), Louisiana Constitution of 1974, *Milstead v. Diamond M. Offshore, Inc., et al.*, 95-2446 (La. 7/2/96) 676 So.2d 89 (1996). In the instant case, the appellate court reviewed the factual findings of the trial court twice, first upon denial of Petitioners' Writ Application on June 24, 1994 and secondly upon the appeal subject of their current application for a petition for writ of certiorari.

Petitioners' third argument complaining of an improper standard of damages only attacks the factual findings of the Louisiana courts. This Court should defer to those factual findings.

Respondent will now address the choice of law factors as set forth by this Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970) beginning with the two factors complained of by Petitioners.

A. THE LOWER COURTS USED THE PROPER LEGAL ANALYSIS IN FINDING THAT UNITED STATES LAW APPLIED TO THE INSTANT CASE

Petitioners complain that the Louisiana courts erred in failing to follow " . . . a specific clause requiring that Norwegian law apply" in Mr. Valdez' contract of employment and further failing to follow the law of the flag,

which they allege to be Norwegian and not a flag of conveniens. However, a choice of law analysis in admiralty and maritime cases such as this, and the applicable substantive law, is determined by evaluating all eight factors set forth in *Lauritzen/Rhoditis*, and not merely the two factors argued by Petitioners. In the instant case, the trial court correctly concluded that an analysis of these eight factors under the particular facts of Carlos Valdez' case mandated the application of the Jones Act, 46 U.S.C. § 688 and the General Maritime Law of the United States. Petitioners merely argue that the trial court should have accepted their version of the "facts" instead of the evidence in the record.

Lauritzen, which was decided by this Court in 1953, set forth seven factors for the court to weigh in its choice of law analysis. These factors are summarized in Gilmore & Black, *The Law of Admiralty*, 2d Edition (1975), as follows:

1) Place of the Wrongful Act;
2) The Law of the Ship's Flag;
3) The Allegiance or Domicile of the Injured Seaman;
4) The Allegiance of the Shipowner;
5) The Place of the Contract, i.e. Where the Shipping Articles were Signed;
6) Inaccessibility of a Foreign Forum; and
7) The Law of the Forum.

Thereafter, in 1970, this Court added an eighth factor in *Rhoditis*, namely the shipowner's base of operations, and noted that there might indeed be other factors:

> " . . . the shipowner's *base of operation* is another factor of importance in determining whether the Jones Act is applicable; and there may well be others . . .
>
> We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner , engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations of a Jones Act 'employer.' "

The *Rhoditis* shipping articles of that Greek flagged vessel contained both a forum selection clause and a choice of law clause mandating a Greek forum and Greek law. It was conceded that Rhoditis, a citizen of Greece, could have obtained relief against the Greek shipowner under Greek law in the Courts of Greece. An action was brought in federal district court in Louisiana and the court found that 95% of the stock of the Greek corporation was owned by a Greek citizen who was a resident of the United States and who managed the corporation out of offices in New York and New Orleans. This Court held that the shipowner's extensive business operation in this country was sufficient to mandate the application of American law.

Respondents will now apply the following *Lauritzen/ Rhoditis* factors to the facts of this case, thereby clearly establishing that the trial court's findings were not only supported by the record in this proceeding, but that the trial court was absolutely correct in deciding to apply U.S. law:

(i) Law of the Flag.

In *Lauritzen*, this Court found United States law not applicable in a case involving a Danish seafarer serving on board a Danish flag vessel, owned by a Danish corporation, whose seaman's contract had been signed in his home country, and provided for the application of Danish law and a Danish forum. The flag of the vessel was not a flag of convenience, but rather the traditional Danish flag. In the instant case, the M/T Vestri did not fly the traditional flag of Norway, but flew the NIS (Norwegian International Ship Registry) flag, which the trial court found factually to be a flag of convenience. On July 1, 1987, Norway amended its laws to compete with open registry, or "flag of convenience" countries such as Panama and Liberia and to authorize the hiring of crew members from third world countries. The law of the vessel's flag, usually of "cardinal importance", is not applicable if the flag is merely one of convenience or if "in the totality of the circumstances" there are substantial and continuing contacts between the alien owner and the United States. *Rhoditis* at 310; *Lauritzen* at 582, 584, 586, 587; *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 439 (2nd Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959), 3 L.Ed.2d 1030, 79 S.Ct. 1138.

The flag of the M/T Vestri is a "flag of convenience". A traditional flagged vessel, as opposed to a flag of convenience, is owned, operated, and managed by the domicilaries of the country of the vessel's flag, hires its crew members from the owner's domicile, pays taxes to that country, and adheres to that country's safety standards. The evidence in the instant case clearly established and the trial court found that the NIS flag flown by the

M/V Vestri was a flag of convenience. The parent company that owned the M/T Vestri is a Bermuda corporation and the vessel was transferred to a Liberian corporation the day of the accident. The company was structured so it would pay no taxes to Norway, nor to any other country in the world. (" . . . the Directors intend to conduct the affairs of the company so that it does not become resident in Norway for taxation purposes. **Accordingly and provided that the company does not participate in activities which are managed or controlled from Norway, the company will not be subject to Norwegian income tax or corporation tax.**") (Prospectus at Page 43-44) (Emphasis added) The 31 crew members on board the M/T Vestri consisted of 19 Filipinos, five Indians, four Croatians, one Burmese, one Polish and one Norwegian. The M/T Vestri had never even been to Norway, much less the Philippines, trading exclusively with the United States where it earned 100% of its income. It is now a matter of hornbook law that flags such as Liberia, Panama, and the second flag of Norway (NIS) are flags of convenience. As stated by Professor William Tetley in *International Conflicts of Law*, International Shipping Publications (1994), p. 213:

> "A flag of convenience is a flag flown by a ship registered in one state, with which the ship has few or no connections, while in reality the ship is owned in, or operated from, another state. A flag of convenience usually exists for economic reasons – shipowners often seek to avoid high taxes, maintenance costs, certain international conventions and the obligation to hire certain

> nationals. It is estimated that flags of convenience accounted for 40% of the world's ships in 1986." (Footnotes omitted.)

In *Admiralty and Maritime Law*, 2d Edition, Practitioner Treatise Series, Volume 1, Section 2-21, "Ship Registration and Nationality", p. 47, Professor Schoenbaum agrees, stating:

> ". . . . Controversy over the genuine link requirement has centered on so-called 'flags of convenience' or 'open registry' states. These are various nations that allow ownership and control of its vessels by non-citizens, maintain easy access to registry, levy low taxes and registry fees, and freely permit manning of vessels by non-nationals."

The Petitioners certainly achieved the hornbook definition of a "flag of convenience". They were successful in avoiding taxes in Bermuda, Norway, United Kingdom (and everywhere else in the world), and the obligation to hire high-cost Norwegian seamen by having a crew of Third World seamen. Professor Tetley further notes that "the law of the flag" is of no importance in an action involving a flag of convenience vessel:

> "But of what importance is the flag today in a world of flags of convenience, where, for example, many Greek ships do not fly the Greek flag? What is the value of the law of the flag where there is double flagging, flagging out and one ship, foreign, shell corporations? The result is that the courts are piercing (or lifting) the corporate veil for all of the above reasons and more. . . .

* * *

> The law of the flag is a most 'venerable institution', as was stated in 1959 [sic] by the Supreme Court of the United States in *Lauritzen v. Larsen*, but it is less venerated today, with 40% of the world's international fleet under flags of convenience. And the Supreme Court said in 1959 [sic] in *Lauritzen* that the flag was only the second of seven contacts to be taken into consideration. What would the Supreme Court say today?" *Tetley, supra*, at pp. 582-583.

Again, Professor Schoenbaum agrees that the law of a flag is of lesser importance, even in a traditional ownership case, as opposed to a flag of convenience:

> "The importance of each of the eight enumerated factors varies with the circumstances, and they will not have equal weight. The factors that are usually stated to be most important are: (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner or operator; (6) whether a foreign forum is available; and (8) the defendant shipowner's base of operations. These factors correctly emphasize the interests and contacts of the parties and the national interests of the respective countries involved."

Based upon the evidence in the record, the trial court was certainly correct in its finding in this case that " . . . the flag of the vessel is not of critical importance and does not mandate application of that country's law." (Petitioners' Appendix 46a) In its *de novo* review of both law and facts, the Appellate Court was certainly correct in likewise finding "The court found that the evidence supported the conclusion that the NIS flag of the Vestri

was a flag of convenience, and, therefore did not mandate the application of Norwegian law." (Petitioners' Appendix 16a, 17a)

(ii) The Place of the Contract, i.e. Where the Shipping Articles were Signed.

The petitioners mistakenly contend that the plaintiff's contract of employment was the Philippine Overseas Employment Contract signed by Mr. Valdez to obtain an exit visa from the Philippines, or the Norwegian individual contract required by the shipowner, or the collective bargaining agreement between the shipowner and the union to which Mr. Valdez did not even belong. None of these documents comprise Mr. Valdez' contract of employment. The law has been established for hundreds of years that a seaman's contract of employment consists of the shipping articles. That remains to be the law according to not only all the U.S. authorities, but likewise the law of every civilized country in this world. *See*: Norris, *The Law of Seamen*, 4th Edition (1985), § 6.1, p. 176, "The Employment Contract". International law recognizes that the shipping articles are the contract of employment as established by International Labor Organization No. 22, a Convention to which Norway is a signatory and which is in evidence. All authorities agree that the shipping articles are the seaman's contract of employment. *See*, Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2d Edition (1994), Vol. 1, p. 242; *Young v. Steamship Co.*, 105 (15 Otto.), U.S. 41 (1882).

Mr. Valdez signed on board the M/T Vestri at Philadelphia, Pennsylvania, at which time U.S. and international law required that he execute the shipping articles which comprise his contract of employment. Petitioners have never produced the shipping articles, despite being requested to do so during discovery, and, as such, the law presumes that the information contained therein would be adverse to defendants' position. The place where the shipping articles were signed, the United States of America, clearly supports the application of U.S. law.

In the instant case, the evidence adduced at the trial clearly established that a "choice of law" clause was not enforceable either in Norway or the Philippines. Moreover, after petitioners filed their Petition for Certiorari with the Louisiana Supreme Court, the Solicitor General of the Republic of the Philippines filed an "Amicus Curiae Brief on behalf of the Republic of the Philippines", specifically stating that Philippine law did not enforce forum selection clauses and urged the Louisiana Supreme Court to affirm the award in favor of Mr. Abuan, on behalf of Carlos Valdez. (Appendix 1a-42a)

(iii) Base of Operations.

Petitioners are not a "Norwegian shipowner/employer" as stated in their brief. The evidence established that the parent company which owned the M/T Vestri was Smedvig Tankship, Ltd., which was incorporated on April 27, 1993, in Bermuda, as a reorganization of the Smedvig Shipping interests. The Smedvig Group consists of all nine entities that were cast in judgment, which were either the owner or owner *pro hac vice* of the

M/T Vestri on the date of the accident. As part of the reorganization of April 27, 1993, the M/T Vestri was sold on the day of the accident to Vestri, Inc., a Liberian corporation, that was wholly owned by defendant Smedvig Tankships, Ltd., the Bermuda parent corporation. The ownership of the Bermuda corporation, Smedvig Tankships, Ltd., resides with the nationals of many countries, including the United States. Stock in Smedvig Tankships, Ltd., was sold to United States' citizens through Net West Securities, Ltd., pursuant to Rule 144(a) of the United States Securities Act of 1933. Petitioner, the owner of the M/T Vestri, was formed with the specific intention of exploiting the U.S. market and earning its income from the U.S. market, as set forth on Page 10 of its Prospectus introduced into evidence.

> "The group intends to exploit the opportunities for trade in the United States where the directors believe that the quality of both vessels and operators will become increasingly important."

The Petitioners were successful in their proposed business plan. At the time of the accident, the M/T Vestri was under charter to Amoco, the American Standard Oil Company, which is based in Chicago, Illinois. Amoco controlled the M/T Vestri's movements and all of the income of the M/T Vestri was earned by trading in the U.S. Carlos Valdez was injured after the vessel left Houston, Texas, and was in route to Philadelphia, Pennsylvania. The owner of the M/T Vestri, Smedvig Tankships, Ltd., has longstanding relations with major U.S. oil companies which consisted of obtaining medium term charters. Two prominent Americans served on and constituted 40% of the board of directors of Smedvig Tankships,

Ltd. The M/T Vestri *never* traveled to Norway nor the Philippines as it was always engaged in commercial activities in the United States. It is also clear that Petitioners specifically intended to avoid the application of Norwegian law. As noted in the Company's Prospectus at Pages 43-44 "Taxation".

> " . . . the directors intend to conduct the affairs of the company so that it does not become resident in Norway for taxation purposes. Accordingly and provided that the company does not participate in activities which are managed or controlled from Norway, the company will not be subject to Norway income tax or corporate tax."

Not only was the shipowner not based in Norway as it successfully avoided taxation of that country, the same evidence established that it was not based in Bermuda or the United Kingdom, where it also avoided taxation:

> " . . . There is no Bermuda income tax, corporation or profits tax, withholding tax, capital gains tax, capital tax, capital transfer tax, state duty or inheritance tax payable by the company or its shareholders . . . ; This will include conducting the affairs of the company so it does not become a resident of the United Kingdom for tax purposes;" (Prospectus, pp. 43-44)

The only activities of the Petitioners in the Philippines were to obtain some of the crew members through a manning agent in Singapore. The Petitioners maintained an equal presence in other countries where crew members were obtained for the M/T Vestri, including India (there were five Indian crew members), Crotia (four Croatian crew members), Burma (one Burmese crew member)

and Poland (one Polish crew member). The facts as found by the district court clearly support the conclusion that the shipowner's base of operations was in the United States of America where it earned all of its income and successfully accomplished its mission to "exploit the American market". As in *Rhoditis*, there is " . . . no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over American citizens engaged in the same business by allowing him to escape the obligations of a Jones Act 'employer'." While this defendant's base of operations in the U.S. is sufficient for the imposition of U.S. law, the other *Lauritzen* factors likewise support the trial court's finding that U.S. law applied to this case.

(iv) The Place of Wrongful Act.

The accident in question occurred in the Straits of Florida after the vessel had sailed from Houston, Texas, in route to Philadelphia, Pennsylvania. The U.S. Coast Guard transported Mr. Valdez to the hospital in Florida where he remained until being placed in the Rehabilitation Hospital in New Orleans, Louisiana.

(v) The Allegiance or Domicile of the Injured Seaman.

The named plaintiff, Nestor Abuan, the curator of Carlos Valdez, is a United States citizen. Carlos Valdez was interdicted in Dade County, Florida, and the guardianship proceedings were subsequently transferred to Louisiana. The interdict, Carlos Valdez, is a citizen of the

Republic of the Philippines, but is domiciled in Orleans Parish, State of Louisiana, and is a resident and domiciliary of the United States where he will be confined at a rehabilitation hospital in Louisiana for the remainder of his life. The testimony was unanimous that Carlos Valdez has the mentality of an eight to nine year old child. The court specifically found that there were no long term rehabilitation facilities available in the Philippines and that the environment offered by Carlos' mother's home was completely inappropriate as the home had " . . . no electricity, sewerage, or running water and she uses petroleum gas to light the house and firewood to cook." (Petitioners' Appendix 82a) The court further noted that Carlos intends to remain permanently in the U.S. where he has remained continuously since the date of the accident. (Petitioners' Appendix 50a, 84a) Gilmore & Black, supra, Page 476, specifically notes that American law should be applied not only to American citizens but " . . . to American 'domicilaries' whether they serve on American flag or foreign flag ships and no matter where they may be injured." Gilmore & Black further note that this Court specifically held that the United States has a "legitimate interest" in its "permanent inhabitancy" sufficient to apply American law citing this Court's decision of *In re Ross*, 140 U.S. 453 (1891). The fact that Mr. Valdez is domiciled in the United States, is being treated in a Rehabilitation Hospital in Louisiana and a U.S. citizen acts as curator in a Louisiana interdiction proceeding, all weigh in favor of the application of U.S. law.

(vi) The Allegiance of the Shipowner.

At best, the allegiance of this shipowner is to itself and certainly not Norway or the Philippines. The parent company is domiciled in Bermuda and on the day of the accident, its wholly owned subsidiary and named owner of the vessel was domiciled in Liberia. The other subsidiaries are based in the United Kingdom, Singapore, and Norway, all countries to which there was certainly no allegiance as Petitioners intentionally avoided sufficient contacts with those countries to avoid the imposition of those countries' laws. United States citizens are shareholders of defendant's corporate entity. The corporation is regulated by the U.S. Securities & Exchange Commission, and two U.S. citizens serve as directors of Petitioners' corporate entity.

(vii) Inaccessibility of a Foreign Forum.

The trial court expressly found that there was no foreign forum available to the plaintiff. (Petitioners' Appendix 52a) The trial court's finding is clearly supported by the evidence in the record.

(viii) The Law of the Forum.

The law of the forum is the United States maritime law, namely the Jones Act, 46 U.S.C. § 688 and the United States General Maritime Law. The trial judge correctly held that this nation has the only significant interest in applying its laws to this controversy:

> "As has been discussed, all of the plaintiff's treating medical witnesses, and medical evidence are located in the United States. The

> Plaintiff has decided to remain in permanent residential care in this country. Because of the particular facts already discussed in connection with the eight factors, the Philippines has little public interest in the resolution of this claim. Louisiana does have an interest in its resolution in order to insure the effectuation of the principles behind the Jones Act and general maritime law." (Petitioners' Appendix 50a)

The petitioners completely ignore both the fact and the well established law that a transnational shipping company should be expected to be sued wherever its vessels can be found, even when the shipowner does not have the substantial, overwhelming contacts that are present in this case. The fact of the matter is that a maritime shipowner which is engaged in international maritime commerce is *always* aware of the risk that it may be haled into court in a distant forum. *Trans-Asiatic Oil, Ltd. v. Apex Oil Company*, 743 F.2d 956 (5th Cir. 1984). *In re Louisville Underwriters*, 134 U.S. 488, 493, 10 S.Ct. 587, 589, 33 L.Ed. 991 (1890). Thus, the Second Circuit has stated that, "[b]ecause the perpetrators of maritime injury are likely to be peripatetic . . . maritime actors must reasonably expect to be sued where their property may be found." *Amoco Overseas Oil v. Compagnie Nationale Algerienne*, 605 F.2d 648, 655 (2d Cir. 1979).

The proper legal analysis was used by all of the Louisiana courts in this case. Petitioners attack the Louisiana courts' factual conclusions. The evidence in this case consists of expert testimony on both Philippine and Norwegian law which supported the trial court's conclusion that United States law, Philippine law and Norwegian law are essentially the same. Therefore, no

"conflict" of law exists and the results would have been the same under any applicable body of substantive law.

B. THE FORUM SELECTION CLAUSE IS NOT ENFORCEABLE BECAUSE THERE WAS A CLEAR SHOWING MADE THAT THE ENFORCEMENT WOULD BE UNREASONABLE AND UNJUST

Petitioners failed to mention that the enforceability of the forum selection clause was considered not once, but twice by the trial court and then two times by the court of appeal. After an extensive hearing on November 8, 1994, the trial court denied defendants' exceptions and request for dismissal on forum non conveniens or a forum selection clause, and preliminarily held United States' law applicable to this proceeding. (Appendix 43a-44a) At that hearing, the trial court considered the *Lauritzen/Rhoditis* factors as to choice of law and the *Bremen, Prado, and Barcelona*[1] decisions as to the enforceability of a forum selection clause. The trial court found that it would be "factually ridiculous" to enforce a forum selection clause in this particular case. (Appendix 47a) On July 25, 1995, the appellate court denied Petitioners' writ application stating in part:

> "The trial court made a factual finding in light of *Bremen v. Zapata* that distinguished the case at bar . . . " (Appendix 49a)

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[1] *Bremen, supra; Prado v. Sloman Neptun Schiffahrts, A.G.*, 611 So.2d 691 (La.App. 4th Cir. 1992); *Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741 (La.App. 4th Cir. 1993).

At the trial in September of 1995, the trial court again evaluated the alleged forum selection clause in accordance with *M/S Bremen v. Zapata, supra,* stating:

> " . . . The results of this Court's analysis is this matter can best be summarized by language from *M/S Bremen v. Zapata*, 92 S.Ct. 1907 (1972), found at 1913, wherein the court found that the justification for allowing a seaman to avoid a forum selection clause is that:
>
> > ' . . . the trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'
>
> Such a result is guaranteed were the Plaintiff in this matter compelled to seek relief where the Defendants would have him compelled to do so . . . " (Petitioner's Appendix 52a)

The appellate court affirmed the decision of the trial court on June 24, 1998. The court of appeal correctly applied the standards set forth in *M/S Bremen v. Zapata Offshore Co., supra*:

> As the Supreme Court noted in *Lejano*, ". . . . according to *The Bremen*, a forum selection clause should be enforced **absent a clear showing that enforcement would be unreasonable and unjust**, or that the clause is invalid for such reasons as fraud or overreaching. (emphasis added; citation omitted)." *Id.* at p. 15, 705 So.2d at 167. (Petitioner's Appendix 8a)

All of this Court's decisions make it clear that a forum selection clause should not be enforced when it would be unreasonable, unjust, overreaching or deny plaintiff his day in court. That is the standard applied by

the Louisiana courts. The facts of this case justify both the trial court and appellate courts' refusal to enforce any of the alleged forum selection clauses.

On March 27, 1993, Carlos Valdez was employed as an engine room cadet, and his salary was $214.00 per month, a rate well below the minimum prescribed by the International Labor Organization for regular seamen and well below the rates of pay stipulated in the Collective Bargaining Agreement that petitioners' claim is applicable to this litigation. The evidence established that Carlos Valdez had never been to sea before, was not a member of any union, was not a "regular seafarer", but instead was a cadet who was required to sign an affidavit acknowledging that he was not a regular crew member. The testimony of Carlos Valdez establishes that the individual employment contract relied upon by petitioner was blank when Mr. Valdez was required to sign it. Additionally, the Collective Bargaining Agreement that petitioners' claim is applicable to this litigation contains a list of seamen covered by the Collective Bargaining Agreement in its appendix and Carlos Valdez' name does not appear on that list. The Petitioners refused to provide the shipping articles executed by Carlos Valdez in Philadelphia which contained no forum selection clause or choice of law clause which legally constituted his contract of employment.

The Jones Act expressly incorporates the Federal Employees Liability Act (hereinafter FELA) and Section 5 of the Act, 45 U.S.C. § 55 provides in pertinent part:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself

> from any liability created by this Act, shall to that extent be void . . . ".

In *Bremen, supra,* this Court stated unequivocally that forum selection clauses were not enforceable as a matter of public policy in certain circumstances such as where prohibited by statute or decision. This is the situation in FELA cases and Jones Act cases:

> "A contractual choice – of – forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared or by statute or by judicial decision. See: e.g., *Boyd v. Grand Trunk W.R.. Co.,* 338 U.S. 263, 94 L.Ed. 55, S.Ct. 26 (1949)". *Bremen, supra,* at p. 15.

The *Bremen* decision simply reaffirms the long-standing rule that when United States law is applicable, either through statutory law such as the Jones Act, or the United States General Maritime Law, that the forum selection clause or any clause limiting the seaman's right in any document is unenforceable as a matter of law as against either the statutory scheme (*e.g.,* FELA) or public policy. In *Boyd v. Grand Trunk, W.R. Co.,* 338 U.S. 263 (1949), this Court specifically held that any agreement restricting the choice of venue awarded by the FELA incorporated into the Jones Act is null and void as being in conflict with the above provision. This Court cited *Duncan v. Thompson,* 315 U.S. 1 (1942) which held that a railway employee's rights may not be contractually limited due to the application of Section 5 of FELA.

In considering petitioners' writ application, the Louisiana Supreme Court had before it the amicus curiae brief of the Republic of the Philippines and the amicus brief of

the Norwegian Shipowner's Association. Simply stated, the Louisiana courts decided this case based upon clear evidence which proved that no forum selection clause was present in Mr. Valdez' contract of employment. The Louisiana courts did not misapply the relevant maritime standards, the Louisiana courts correctly applied the facts of this case and rendered judgment accordingly. This Court should not disturb the Louisiana courts' factual findings.

Petitioners' reliance upon *Lejano v. K.S. Bandak*, 97-0388 (La. 12/12/97), 705 So.2d 158, *rehearing denied*, (La. 327 98), *cert. denied*, ___ U.S. ___ (1998) is misplaced. In the instant case, both the trial court and appellate court distinguished *Lejano* factually and followed the federal standards of *Bremen* and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 588 (1991). Likewise, the evidence and record in *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998), *cert. denied*, ___ U.S. ___ (1998) were entirely different from the evidence in record in the instant case. In the instant case, the trial court found the forum selection clause fundamentally unfair because the evidence established that not only was it not enforceable in either Norway or the Philippines, but that Carlos Valdez had no notice of the clause and that he carried his burden of proof that it should not be enforced in accordance with the standards set forth in *Bremen v. Zapata, supra.*

C. THE COURT UTILIZED THE PROPER STANDARD TO DETERMINE FUTURE MEDICAL CARE

Respondents argue that the future medical care should not have been awarded based on American standards because Carlos Valdez may not be able to remain permanently in the United States. The appellants' argument is factually and legally incorrect. In the instant case, the court looked to the evidence to determine the amount of damages regardless of the standard utilized. In the instant case, the evidence established that the cost of pertinent care in the Rehabilitation Living Center would be $6,300,000.00. The trial court, based upon the testimony of numerous experts, awarded $3,000,000.00, a figure that was between the cost of residential care at the Rehabilitation Living Center and the cost of home care. Moreover, the court noted " . . . this award is consistent with the plaintiff's evidence of the cost of future care for Mr. Valdez in the Philippines." (Petitioners' Appendix 25, FN 17) Therefore, regardless of the standard, American or Philippine, the award was based upon the evidence in the record in this particular case. Math is math, whether the computation of future care costs is in the Philippines or in the United States. In the instant case, the evidence of care in either country supported the award of $3,000,000.00.

Even if Respondent had not presented evidence, which he did, as to the cost of future care in the Philippines, the award would have been proper because of the finding that there were no adequate facilities in the Republic of the Philippines. In *Sosa v. M/V Largo Izaball*, 736 F.2d 1028 (5th Cir. 1984), the court held that future

medical awards are properly based on American standards if the trial court finds that there are no adequate facilities in the Republic of the Philippines:

> "The award for past and future medical expenses was, however, based on American standards; the district court was correct in so doing and that it specifically found that Sosa would not receive adequate medical care in Mexico. Memorandum and Order at 22."

Also, in *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir. 1982), the court held that future economic losses may be based on American standards even though there was no showing of inadequate services or facilities in the foreign country, if the plaintiff " . . . intended to reside permanently in the United States" and was "properly entitled to remain in the United States for his medical care."

As the Petitioners well know, Carlos Valdez is eligible for a medical parole to remain here indefinitely. *See* 14 INA, § 212(d)(5), 11 U.S.C. § 1182(d)(5); 8 C.F.R. § 253.1; Immigration and Naturalization Operational Instructions at OI 242.1(a)(22). District directors for the Department of Justice, Immigration and Naturalization Service, have wide latitude to grant general parole to persons such as Mr. Valdez, when such action is deemed to be in the public interest. The fact that Mr. Valdez now has the mental capacity of an eight year old child, that he cannot receive adequate medical care in the Philippines, and that he will not be a public charge whose medical care is paid for by U.S. taxpayers, shows that it would be in the public interest for him to remain here for his needed

permanent medical care. Moreover, the Petitioners completely misstate the law when they argue that plaintiff has the burden of proving "lawful entitlement to be present in the United States for all periods for which damages are sought." In support of this novel argument, Petitioners cite cases dealing with "back pay awards" dealing with violations of the National Labor Relations Act. Sufficed to say, it is impossible to "reinstate" a deported alien into his job in the United States, a country from which he has been deported.

CONCLUSION

Petitioners' application for a writ of certiorari does not remotely meet the standards imposed by Rule 10 of the Rules of the Supreme Court of the United States. The ruling of the trial court, court of appeal and Louisiana Supreme Court in no way conflicts with the decision of another state court of last resort or of a United States Court of Appeal or this Court. Instead, the decision of the Louisiana courts meticulously follows the teachings of this Court in *Lauritzen, Rhoditis, Bremen and Carnival Cruise Lines, Inc.*

Petitioners attempt to rewrite the record of this proceeding by referring to itself as a "Norwegian shipowner" when in truth and fact the record establishes that it was a Bermuda company that paid no taxes to anyone in the world, that it was formed solely to exploit the American market, with 40% of its directors being American citizens, and also with American shareholders and earning 100% of its income from the United States.

Respondents speak of contracts containing forum selection clauses, even though the contracts were in blank, the seamen had no notice of the forum selection clause and were not members of the union or named in the list of individuals covered by the collective bargaining agreement.

Respondents submit that Petitioners' request for a writ of certiorari should be summarily denied.

Respectfully submitted,

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SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON BEHALF
OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS
SMEDVIG TANKSHIPS, LTD., ET AL.,
Defendant-Appellant

Amicus Curiae of the Republic of the Philippines
On Defendant Smedvig Tankships, Ltd/. et al.'s
Application for Writ of Certiorari
Directed to the Fourth Circuit Court of Appeal
Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth
Judicial District Court
for the Parish of Plaquemines
Docket No. 38-719. Division "B"
Honorable William A. Roe, Presiding

PETITION TO FILE AMICUS CURIAE BRIEF OF THE REPUBLIC OF THE PHILIPPINES ON THE APPLICATION FOR WRIT OF CERTIORARI OF SMEDVIG TANKSHIPS, LTD., ET AL.

RESPECTFULLY SUBMITTED:

RICARDO P. GALVEZ
Solicitor General

AMY C. LAZARO-JAVIER
Assistant Solicitor General

ROMEO R. RAMOLETE
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Republic of the Philippines
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SUPREME COURT OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON BEHALF
OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS
SMEDVIG TANKSHIPS, LTD., ET AL.
Defendants-Appellants

Interest of the Republic of the Philippines on
Defendant Smedvig Tankship Ltd., et al.,'s
Application for Writ of Certiorari Directed to
Fourth Circuit Court of Appeal
Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth
Judicial District Court
For the Parish of Plaquemines
Docket No. 38-719, Division "B"
Honorable William A. Roe, Presiding

PETITION TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE REPUBLIC OF THE PHILIPPINES

The Republic of the Philippines respectfully petitions this Court for permission to file the attached Amicus Curiae Brief for the following reasons:

1.

The Republic of the Philippines has an interest in protecting the rights of its citizens, including but not limited to seafarers serving on board foreign flagged vessels that have contacts with many countries throughout the world.

2.

The Republic of tile [sic] Philippines is the largest provider of seamen to flag of convenience vessels than any other country in the world.

3.

The Republic of the Philippines has reviewed and studied the Opinion of the Court of Appeals for the Fourth Circuit, State of Louisiana, dated June 24, 1998 which correctly interpreted Philippine law that the forum selection clause is not enforceable in the Philippines.

4.

The Republic of the Philippines also reviewed this Honorable Court's decision dated December 12, 1997, in the case of *Lejano v. Bandak*, Docket No. 97-CC-0388, 705

So.2d 158 (La. 1997), wherein it denied a Filipino seaman access to the judicial system of the United States. It respectfully submits that in doing so, it misinterpreted Philippine laws and misconstrued the role and function of the Philippine Overseas Employment Administration. The Honorable Court erred in holding a forum selection clause in a standard Philippine Overseas Employment Administration employment contract to be enforceable under Philippine law.

5.

The Republic of the Philippines has an interest in seeing that our laws are properly interpreted specially [sic] when they are used as the basis of a Court decision.

6.

The Republic of the Philippines has a substantial, legitimate interest as it and/or its citizens will be affected by the outcome of this case and its implication in other cases involving other Filipino seamen before other Courts in the United States of America.

7.

The Republic of the Philippines requests this Honorable Court to affirm the decision of the trial court and the Court of Appeal in the above-captioned case.

WHEREFORE, Mover, the Republic of the Philippines, prays that it be granted leave to file the attached Amicus Curiae Brief.

Makati City, Philippines, October 21, 1998.

Respectfully submitted,

/s/ Ricardo P. Galvez
RICARDO P. GALVEZ
Solicitor General
IBP No. 463184, Jan. 7, 1998

/s/ Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
Assistant Solicitor General
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/s/ Romeo R. Ramolete
ROMEO R. RAMOLETE
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IBP No. 365312, Jan. 25, 1994

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SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.
Defendant-Appellant

Amicus Curiae of the Republic of the Philippines
Relative to Defendant Smedvig Tankships, Ltd/. et al.'s
Application for Writ of Certiorari Directed to the Fourth
Circuit Court of Appeal Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth Judicial District Court
for the Parish of Plaquemines Docket No. 38-719.
Division "B" Honorable William A. Roe, Presiding

AMICUS CURIAE BRIEF OF THE REPUBLIC OF THE PHILIPPINES ON THE APPLICATION FOR WRIT OF CERTIORARI OF SMEDVIG TANKSHIPS, LTD., ET AL.

RESPECTFULLY SUBMITTED:
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AMY C. LAZARO-JAVIER
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SUMMARY OF THE ARGUMENT

1. **The Philippine Overseas Employment Administration.**

The Philippine Overseas Employment Administration was created on May 1, 1982 through Executive Order No. 797, later amended on July 24, 1987. Among its functions is to "secure the best terms and conditions of Filipino contract workers and ensure compliance therewith". In implementing this function, the POEA periodically issues memorandum circulars setting minimum requirements or standards of compensation based on prevailing international standards and those provided under collective bargaining agreements. Its limited role in the employment process of seafarers is only to determine whether or not the minimum terms on wages and benefits are included in the employment contract.

2. **Forum Selection Clause is not enforceable in the Philippines.**

A forum selection clause is a contract of adhesion under Philippine law. Forum selection clause cannot be enforced in such a manner as to deprive a court of competent jurisdiction over the case and the parties where such jurisdiction is otherwise lawful and proper.

3. **The Philippines Overseas Employment Administration Contract.**

Benefits contained in the Philippines Overseas Employment Administration contract are not the exclusive benefits remedies available to a Philippine seafarer. A Filipino seafarer's remedy and tort are separate and distinct from the benefits conferred under the Philippine Overseas Employment Administration rules and regulations and contract of employment. The Philippine Overseas Employment Administration Contract only prescribes minimum

wage and benefits and does not prohibit higher benefits when provided by either Philippine law or that of another country.

4. **The Public Policy of the Republic of the Philippines.**

The policy of the Republic of the Philippines prohibits the enforcement of a forum selection clause. On June 7, 1995, the Philippines enacted Republic Act No. 8042 otherwise known the [sic] "Migrant Workers' Act and Overseas Filipinos Act of 1995 which took away from the Philippine Overseas Employment Administration jurisdiction over claims to Philippine workers. This Act recognizes that "Migrant Workers" such as Philippine seafarers, may elect to file their claim in a foreign country for money claims arising from the employer-employee relationship or arising from tort or delict.

SUPREME COURT OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.
Defendants-Appellants

Amicus Curiae of the Republic of the Philippines on Defendant Smedvig Tankship Ltd., et al.,'s Application for Writ of Certiorari Directed to Fourth Circuit Court of Appeal Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth Judicial District Court for the Parish of Plaquemines Docket No. 38-719. Division "B" Honorable William A. Roe, Presiding

---

AMICUS CURIAE BRIEF ON BEHALF OF THE REPUBLIC OF THE PHILIPPINES ON APPLICANT SMEDVIG TANKSHIPS, LTD., ET AL.,'S APPLICATION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE HONORABLE COURT:

In *Lejano vs. K.S. Bandak*, No. 97-CC-0388, this Court ruled that " . . . the employment contract drafted and approved by the Philippine government, particularly the POEA, would be enforceable under the laws of that country. This Court is not inclined to extract the forum selection provision of the employment contract, which would otherwise be enforceable under Philippine law" and that "(u)nder these circumstances, this court finds that the forum selection provision of the employment contract is not adhesive . . . " (Opinion, p. 19).

The above opinion of this Court, it is respectfully submitted, would have been correct if the case involved claims, complaints or controversies relative to the implementation and interpretation of the contract. As it was, the claim of Lejano was based on *tort* and, therefore, the forum selection clause is not applicable. The same is true in the present case of Valdez. The ruling of the Federal District Court for the Southern District of New York in *Leonardo A. Cuizon vs. Kedma, Ltd., Joshua Shipping Ltd.*, 96 Civ. 0229 (SS) (January 29, 1997), as applied by the Fourth Circuit Court of Appeal, is the correct view.

This Court further opined that the employment contract was " . . . bargained for and approved by the POEA" and that "the POEA acted on his behalf in negotiating and bargaining for the terms of the contract". (Opinion p. 18)

With due respect, however, Philippine laws, policy, and jurisprudence invariably support a different position on the matter, as shall be discussed in the succeeding submission.

1. THE NATURE AND ROLE OF THE PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION

The Philippine Overseas Employment Administration (POEA) was created on May 1, 1982 through Executive Order No. 797, signed by then President Ferdinand E. Marcos which abolished several bureaus in the Department of Labor and Employment including the Bureau of Employment Services, the National Seamen Board and the Overseas Employment Development Board.

On July 24, 1987, President Corazon C. Aquino issued Executive Order No. 247 reorganizing the POEA structurally and functionally. The powers and functions of the POEA under this Executive Order are:

> "SEC. 3. *Power and Functions.* – In pursuit of its mandate, the Administration shall have the following powers and functions:
>
> (a) Regulate private sector participation in the recruitment and overseas placement of workers by setting up a licensing and registration system;

(b) Formulate and implement, in coordination with appropriate entities concerned, when necessary, a system for promoting and monitoring the overseas employment of Filipino workers taking into consideration their welfare and the domestic manpower requirements;

(c) Protect the rights of Filipino workers for overseas employment to fair and equitable recruitment and employment practices and ensure their welfare;

(d) Exercise original and exclusive jurisdiction to hear and decide all claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers or overseas employment including disciplinary cases; and all pre-employment cases which are administrative in character involving or arising out of violation of recruitment laws, rules and regulations including money claims arising therefrom, or violation of the conditions for issuance of license or authority to recruit workers.

All prohibited recruitment activities and practices which are penal in character as enumerated and defined under and by virtue of existing laws, shall be prosecuted in the regular courts in close coordination with the appropriate departments and agencies concerned;

(e) Maintain a registry of skills for overseas placements;

(f) Recruit and place workers to service the requirement for trained and competent Filipino workers by foreign governments and their instrumentalities and such other employers as public interest may require;

(g) Promote the development of skills and careful selection of Filipino workers for overseas employment;

(h) Undertake overseas market development activities for placement of Filipino workers;

(i) Secure the best terms and conditions of employment of Filipino contract workers and ensure compliance therewith;

(j) Promote and protect the well-being of Filipino workers overseas;

(k) Develop and implement programs for effective monitoring of returning contract workers, promoting their re-training and re-employment of their smooth reintegration into the mainstream of national economy in coordination with other government agencies;

(l) Institute a system for ensuring fair and speedy disposition of cases involving violation of recruitment rules and regulations as well as violation of terms and conditions of overseas employment;

(m) Establish a system for speedy and efficient enforcement of decisions laid down through the exercise of its adjudicatory function;

(n) Establish and maintain close relationship and enter into joint projects with the Department of Foreign Affairs, Philippine Tourism Authority Manila International Airport Authority, Department of Justice, Department of Budget and Management and other relevant government entities, in the pursuit of its objectives. The Administration shall also establish

and maintain joint projects with private organizations, domestic or foreign, in the furtherance of its objectives."

To "secure the best terms and conditions of employment of Filipino contract workers and ensure compliance therewith", the POEA, from time to time, issues Memorandum Circulars setting minimum requirements or standards of compensation and other benefits for overseas Filipino workers, specially our seafarers, to keep them at par with prevailing international standards and those provided under collective bargaining agreements.

Thus, the POEA Memorandum Circulars always stipulate:

> "The terms and conditions provided in this revised employment contract are the **MINIMUM REQUIREMENTS** acceptable to the Ministry of Labor and Employment/Philippine Overseas Employment Administration for the employment of a Filipino seaman. They may, therefore, be improved upon by the parties concerned if the parties so desire. Such amendments or improvements to this contract however, must be put in writing annexed to the contract and submitted to the appropriate offices of the POEA when processing contracts of employment for seaman."
>
> – POEA Circular No. 2
> Series of 1983
> December 29, 1983

> "It is understood that the terms and conditions provided in this revised employment contracts [sic] are the **MINIMUM REQUIREMENTS** acceptable to this office for the overseas employment of a Filipino seaman on board

oceangoing vessels. The parties to an employment of a seaman may therefore improve on these minimum terms and conditions provided such improvements are not forced upon one party by the other through threat, coercion, intimidation or duress. They shall be made in writing and appended to this contract when submitted to this office for processing and approval. Moreover, such improvements should have prospective application."

– POEA Circular No. 41
Series of 1989
July 14, 1989

"It is reiterated that the terms and conditions provided in this revised employment contract are the **MINIMUM REQUIREMENTS** acceptable to POEA for the overseas employment of a Filipino seafarer. The parties to an employment of a seafarer may therefore improve on these minimum terms and conditions provided such improvement shall be made in writing and appended to this contract and submitted to POEA for processing and approval. Moreover, such improvements should have prospective application."

–POEA Circular No. 55
Series of 1996
December 16, 1996

Likewise, the POEA fixes or upgrades the salaries of seafarers based on rates suggested, made, and/or approved by the Joint Maritime Conference of the International Labour Organization (ILO).

Thus, the statement in *Lejano* that the "employment contracts" of Mr. Lejano at issue were bargained for by

the POEA is incorrect. At no time did the POEA bargain for their terms or conditions of Mr. Lejano's contract of employment nor the contract of employment for any Filipino seaman. The POEA's limited role in the employment process was and is only to review the employment contract(s) to determine whether or not the minimum terms on wages and benefits were included in any prospective relationship involving a Filipino seafarer and his employer.

A review of the applicable provision of our Labor Code is instructive. Section 3, Rule II, Book V of the Philippine Overseas Employment Administration (POEA) New Rules and Regulations provides:

> "Standard Employment Contract. The Administration shall undertake development and/or periodic review of contracts for land based workers and conduct regular review of standard employment contracts (SEC) for seafarers. These contracts shall provide for minimum employment standards herein enumerated under Section 2 of this Rule and shall recognize the prevailing labor and social legislations at the site of employment and international conventions. The SEC shall set the **MINIMUM TERMS AND CONDITIONS OF EMPLOYMENT**. All employers and principals shall adopt the SEC in connection with the hiring of workers without prejudice to their adoption of other terms and conditions of employment over and above the minimum standards of the administration."

As can be gleaned from the above proviso, the POEA standard form documents merely set the minimum standards of the terms and conditions of employment. The

above-cited regulation also prohibits the inclusion or enforcement of any terms or conditions in the contract of employment or collective bargaining agreement which would infringe on the right of a Filipino seafarer to seek tort damages before any court of competent jurisdiction such as a U.S. court.

Our Supreme Court expressly held in *Vir-jen Shipping and Marine Services, Inc. v. NLRC*, G.R. Nos. L-58011 & L-58012, November 18, 1983, 125 8CRA 577, 589:

> "(T)he form contracts approved by the National Seaman Board (now POEA) are designed to protect Filipino seaman not foreign shipowners who can take care of themselves. The standard forms embody the basic minimums which must be incorporated as parts of the employment contract. (Section 15, Rule V. Rules and Regulations Implementing the Labor Code.) They are not collective bargaining agreements nor immutable contracts which the parties cannot improve upon or modify in the course of the agreed period of time."

Hence, it is clear that the sole purpose of having overseas contracts of employment reviewed by the POEA is to determine whether or not such employment contracts conform to the minimum wage and benefits prescribed by the POEA. In other words, the law does not at all prohibit any modification which provides for better terms of employment, such as higher wages or other benefits voluntarily granted by the employer in the seaman's employment contract, i.e., in the case of a seaman, the vessel's shipping articles or other such shipboard employment contracts.

2. FORUM SELECTION CLAUSES NOT MUTUALLY ENTERED INTO BY THE PARTIES, ARE UNENFORCEABLE IN THE REPUBLIC OF THE PHILIPPINES.

Under Philippine law, the seaman's employment contract itself is a contract of adhesion and is not considered to be immutable. This is so because the terms and conditions embodied in the employment contract are not freely negotiated for by the Filipino seaman since the seaman does not enjoy any bargaining power with his employer concerning the terms and conditions of his employment. (See, e.g., *Vir-jen Shipping and Marine Services, Inc. vs. NLRC, et al.*, 125 SCRA 577). The fact that a Filipino's employment contract is a contract of adhesion has long been recognized by the Philippine courts. Our Supreme Court applies this rule of law in the case of *Mercury Drug Co. v. Dayao*, 117 SCRA 99:

> "The contention that employees know the terms of their employment contracts and should be bound thereto is anachronistic in this time and age. Filipino workers do not have the luxury or freedom to decline job openings or resign when the terms are onerous."

The terms of the Filipino seaman's employment, therefore, cannot be enforced against the seaman in such a way as to deprive the seaman of any right or remedy available to him under the law including the right to pursue a claim for tort damages against his employer or a vessel owner in any fora where a court has jurisdiction over the case. This includes the right of the seaman to sue his employer or the vessel owner for tort damages arising out of an on-the-job accident which occurred on board

the employer's or shipowner's vessel. Philippine courts have already recognized the fact that a Filipino seaman or his representatives may seek civil damages before the courts of the United States, including specifically the civil courts in Louisiana.

The opinion of the POEA in *Philimare Shipping & Equipment and H. Glahr Co. v. Philippine Overseas Employment Administration, Mamerto Geguera and Charito Bantista-Geguera,* POEA Case (M)-90-10-1106 (July 15, 1992) correctly applies the laws of the Philippines. In that case, a Filipino seafarer was killed while working overseas on board a vessel which was also "covered" by an "AMOSUP" collective bargaining agreement which had been negotiated between the vessel owner and the union. The POEA standard form employment contract also contained the same language which is cited by this Court in *Lejano.* In *Geguera* (POEA case), the shipowner sought to compel the survivors of the Filipino seafarer to submit their claims for adjudication before the POEA. The record in the *Geguera* case reveals that Mrs. Geguera elected to pursue her claims against the shipowner-employer before a U.S. court, namely the 23rd Judicial District Court for the Parish of Ascension, State of Louisiana. In the light of the fact that Mrs. Geguera had filed suit before a Louisiana court, the POEA correctly applied Philippine law and dismissed the shipowner-employer's complaint. The POEA stated:

> "Instead, complainant, decided to pursue his claim against the shipowners before U.S. Courts. It [sic] appearing that the complainant refuses to submit to the jurisdiction of this Office with

respect to his claim, it is but proper that his complaint be dismissed.

"WHEREFORE, premises considered, this case should be, as it is hereby ordered dismissed."

Philimare appealed this case to the Supreme Court (*Philimare Shipping & Equipment Supply, et al. vs. Philippine Overseas Employment Administration, et al.*, G.R. No. 109567). Asked by the Supreme Court to comment, the Office of the Solicitor General said:

"Further, there is no dispute that Section 1 (d), Rule 1, Book VII, of the 1991 Rule and Regulation Governing Overseas Employment vests on the POEA original and exclusive jurisdiction to hear and decide claim for death benefits. But that jurisdiction is purely on the subject matter as contra-distinguished from jurisdiction over the person of the parties. As held in Manila Railroad Co. vs. Attorney-General, 20 Phil. 523:

" 'As to the subject matter, nothing can change the jurisdiction of the court over it. None of the parties to the litigation can enlarge or diminish it or dictate when it shall attach or when it shall be removed. That is a matter of legislative enactment which none but the legislature may change. On the other hand, the jurisdiction of the court over the person is, in some instances, made to depend, indirectly at least, on the party's volition. As we have said, jurisdiction of the subject matter does not depend on the consent or objection, on the acts or omissions of the parties or any of them. Jurisdiction over the person however, may

> be conferred by consent, express or impliedly given, or it may, by an objection, be prevented from attaching or removed after it has attached.'
>
> "In the present case, private respondents by filing their Manifestation (Annex "F", Petition) to the effect that they are pursuing their claim before the U.S. courts in lieu of the POEA effectively removed that latter's jurisdiction over their persons where it had initially attached. Clearly, it is no error on the part of public respondent to order the dismissal of the complaint on that basis."

The Supreme Court resolved this appeal on September 29, 1993, and affirmed the fundamental right of the Filipino seaman's representatives to institute an action for tort damages before United States Courts. The right to seek tort damages before a competent court of law is a fundamental feature of the admiralty law of this country and all civilized countries, and the seaman's employment contract cannot, under recognized principles, be interpreted to prohibit the seaman's institution of an action for tort damages before any local or foreign court of competent jurisdiction. Copies of the Office of the Solicitor General's Comment in *Geguera* case is attached hereto as Annex "A" and the Supreme Court ruling as Annex "B".

Philippine law and the Philippine courts also recognize the fact that agreements on venue, commonly known as "forum selection clauses" contained in any maritime contract cannot be used to oust a court of its jurisdiction over a case, where the court otherwise has lawful jurisdiction over the case and the parties. This is true for two reasons. The first reason is that jurisdiction over a case is

conferred by law and private parties by way of an agreement and/or stipulation may not deprive a court of its lawful jurisdiction. The second commonly stated reason for denying enforcement of a forum selection clause is that the clause is in essence merely an objection to venue. Objection to venue can be waived. Waiver can occur as a result of many actions which constitute a lawful appearance by the party before the court or where the party invokes the power of the court to grant him some form of interim or interlocutory relief. This conduct specifically includes filing a motion to vacate or discharge a writ of attachment, posting of bond or security to dissolve the writ and filing a reply to the opposition to dissolution of the writ of attachment.

A recent admiralty case decided by our Supreme Court is illustrative of these points. In *Philippine International Trading Corporation v. M.V. Zileen Navigation Co., SA., et al.*, G. R. No. 102904 (1992), the defendant shipowner sought to enforce a contractual forum selection clause. In that case, the parties entered into an agreement which also stipulated that "disputes arising out of the contract" were to be submitted exclusively to the High Court of Singapore. Following the loss of the vessel's cargo, the plaintiff filed suit in the Regional Trial Court (equivalent of the U.S. District Court). The defendant filed a motion to dismiss the action in favor of the High Court in Singapore. The lower court granted the motion to dismiss. Plaintiff went to the Supreme Court on a petition to review by certiorari. In reversing the trial court, our Supreme Court ruled:

"In the petition at bar, petitioner insists that paragraph 10 of the covenant is an illegal agreement on *competencia* because it deprives Philippine courts from handling any case that may arise under the agreement. x x x

"x x x

"While We perceive merit in the petition, it must be impressed upon petitioner that paragraph 10 of the Agreement may not be equated with *competencia* and neither does it suggest that Philippine courts are divested of authority by reason of the parties' express preference to vest jurisdiction in the High Court of Singapore. Indeed, it was emphasized in *International Harvester Co. vs. Hamburg American Line,* (42 Phil. 845 [1918]):

> 'The only other point raised by the bill of exceptions, which we deem it necessary to notice, is based on a provision in the bill of lading to the effect that all disputes arising under the contract are, at the option of the defendant company, to be decided according to German law and exclusively by the Hamburg courts. From this it is argued that the Court of First Instance erred in assuming jurisdiction of the action and that the case should have been decided in accordance with the principles of German law.
>
> 'It can not be admitted that a provision of this character has the effect of ousting the jurisdiction of the courts of the Philippines Islands in the matter now before it. **An express agreement tending to deprive a court of jurisdiction conferred on it by law is of no effect.** *Molina vs. De la Riva,* 6 Phil. 12.)" (p. 855)'

"In resolving this problem, which is analogous to the scenario that obtained in *Atlas Developer and Steel Industries, Inc. vs. Sarmiento Enterprises, Inc.* (184 SCRA 153 [1990]), petitioner must heed the reminder that:

> ' . . . Although it provides that a City Court of Manila shall have 'jurisdiction' over a legal action arising from the contract, the parties must have intended to fix the venue only, **for jurisdiction over an action is conferred by law, and may not be changed by mere agreement of the parties** (*Calimlim, et al. vs. Ramirez, et al.*, 118 SCRA 399; *De Jesus, et al vs. Garcia et al.*, 19 SCRA 554)." (p. 155)

"x x x

"WHEREFORE, the petition is hereby GRANTED. The order dated November 26, 1991 is SET ASIDE and the case is hereby REMANDED to the court of origin for further proceedings.

"SO ORDERED."

– 215 SCRA 309, 312-313, 315

In fine, the forum selection clause which are embodied in the employment contracts do not preclude the seafarer from filing a tort case wherever he can obtain jurisdiction over his employer or shipowner.

3. THE POEA CONTRACT

Regarding the remedies available to Filipino seafarers, it must be stressed that the benefits set forth in the employment contracts and POEA regulations are not the

exclusive benefits or remedies available to a Filipino seafarer. The POEA contractually-based benefits are merely guaranteed minimum benefits and a Filipino seafarer also enjoys remedies under Philippine tort law arising from the provisions of the Philippine Civil Code and maritime law. A Filipino seafarer's remedies in tort are separate and distinct from the benefits conferred under the POEA rules and regulations or any contract of employment or collective bargaining agreement. Any argument to the contrary is completely erroneous under Philippine law.

The standard form POEA contract of employment involved in this case, particularly paragraph 4, reads:

> "All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established Grievance Machinery in the Revised Employment Contract for seafarers, the adjudication procedures of the Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order".

Contrary to the Opinion in *Lejano*, the standard form POEA contract of employment does not contain either a choice of law or forum selection clause. Such clauses would violate not only the public policy of the Philippines but would also contravene our statutory laws. It is important to note that the cited language clearly and unambiguously refers only to issues or claims regarding the interpretation or implementation of the agreement itself and clearly does not refer or pertain to tort actions. Our government is aware of the argument made before courts of the United States by legal representatives of

foreign employers and shipowners that this cited language applied to tort claims. This assertion is entirely untrue because the POEA is devoid of jurisdiction over tort claims. Our government is also aware of the argument that this cited language constituted a "forum selection clause" which granted the POEA "exclusive" or "mandatory jurisdiction over the tort claims of Filipino seafarers. Again, this assertion is incorrect for the reasons heretofore stated.

4. THE PUBLIC POLICY OF THE REPUBLIC OF THE PHILIPPINES

A careful review of the decisions in *Lejano* and in *Barcelona v. Sea Victory Maritime, Inc.* 619 So.2d 741 (La.App. 4th Cir. 1993) and *Prado V. Sloman Neptune Schiffarts, A.G.* 611 So.2d 691 (La.App. 4th Cir. 1992) indubitably reveals that the statements and conclusions contained therein pertaining to Philippine Law and the role and authority of the POEA should be addressed with specific clarification on very important matters.

With respect to the role and authority of the POEA, the following disquisition is relevant. There were complaints from various sectors that the POEA was not adequately serving or protecting the rights of Filipino seafarers. In response to this problem, Republic Act No. 8042 otherwise known as the "Migrant Workers and Overseas Filipinos Act of 1995, (hereinafter referred to as Migrant Workers Act, for brevity) enacted on June 7, 1995, took away from the POEA jurisdiction over all claims of Filipino overseas workers, including seafarers. This Act is the most current expression of Philippine law

and public policy relating to Filipino overseas workers, including seafarers. It expressly recognizes the right of the Filipino seafarer to institute suit against his employer or shipowner before the court of foreign countries. The Act provides in part:

> "SEC. 23. **Role of Government Agencies.** – The following government agencies shall perform the following to promote the welfare and protect the rights of migrant workers and as far as applicable, all overseas Filipinos:
>
> "(a) Department of foreign Affairs. – The department, through its home office or foreign posts, shall take priority action or make representation with the foreign authority concerned to protect the rights of migrant workers and other overseas Filipinos and extend immediate assistance including the repatriation of distressed or beleaguered migrant workers and other overseas Filipinos:
>
> "(b) Department of Labor and Employment – The Department of Labor and Employment shall see to it that labor and social welfare laws in the foreign countries are fairly applied to migrant workers and whenever applicable, to other overseas Filipinos including the grant of legal assistance x x x.
>
> "x x x
>
> "SEC. 24. **Legal Assistant for Migrant Workers Affairs.** – There is hereby created the position of Legal Assistant for Migrant Workers Affairs under the Department of Foreign Affairs who shall be primarily responsible for the assistance services to be provided to Filipinos migrant workers as well as overseas Filipinos in

distress. He shall have the rank, salary and privileges equal to that of an undersecretary of said Department.

"Among the functions and responsibilities or [sic] the aforesaid Legal Assistant are:

(a) To issue the guidelines, procedures and criteria for the provision of legal assistance services to Filipino migrant workers;

(b) To establish close linkages with the Department of Labor and Employment, the POEA, the OWWA and other government agencies concerned, as well as with non-governmental organizations assisting migrant workers, to ensure effective coordination and cooperation in the provision of legal assistance to migrant workers;

(c) To tap the assistance of reputable law firms and the Integrated Bar of the Philippines and other bar associations to complement the government's efforts to provide legal assistance to our migrant workers;

(d) To administer the legal assistance fund for migrant workers established under Section 25 hereof and to authorize disbursements therefrom in accordance with the purposes for which the fund was set up; and

(e) To keep and maintain the information system as provided in Section 20.

"The Legal Assistant for Migrant Workers Affairs shall have the authority to hire private lawyers, domestic or foreign, in order to assist him in the effective discharge of the above functions."

Copy thereof is attached hereto as Annex "C".

Thus, contrary to the statements made in *Lejano*, it is the public policy of the Philippines to protect the right of a Filipino seafarer to institute suit against his employer or shipowner before any court of competent jurisdiction whether domestic or foreign Philippine law does not in any way limit the right of an injured Filipino seafarer to pursue his employer in a foreign forum, including specifically the courts of the United States and the State of Louisiana.

We have thoroughly reviewed and completely concur with the opinion of experts Justice Nestor Alampay and Professor Ruben Balane submitted in evidence in this case, establishing that tort claims are not within the jurisdiction of POEA. The POEA is only possessed with jurisdiction over money claims arising from the employer-employee relationship covered by the POEA contracts. The POEA has no jurisdiction over actions arising from torts.

In fact, while the old POEA employment contract provided:

> "4. All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established Grievance Machinery in the Revised Employment Contract for seafarers, the adjudication of the Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order",

the new POEA employment contract, adopted through POEA Memorandum Circular No. 1996, Series of 1996, following the enactment of the Migrant Workers Act, now provides:

> "4. All claims, complaints or controversies relative to the implementation of the overseas employment contract shall be resolved through the established Grievance Machinery in the Revised Employment Contract for Seafarers. If result of the procedure is unsatisfactory to any of the parties, it may be appealed to the management of the Company or with the Philippine Labor Attache or consular officer overseas. This procedure shall be without prejudice to any action that the parties may take before the appropriate authority".

Simply said, the adjudicatory machinery and procedure of the POEA at issue in the *Lejano* no longer exist today.

In *Kenneth McKenzie, et al. vs. Hon. Emeterio C. Cui, et al.*, G.R. No. 48831 (Feb. 6, 1989), the Philippine Supreme Court expressly ruled that the National Seaman's Board (now POEA) has no jurisdiction over tort claims. In that case, the Supreme Court said:

> "On January 15, 1976, private respondent (Aguedo Lomod), a licensed seaman filed with the court *a quo* a complaint for recovery of certain sums of money, with damages against petitioners Kenneth McKenzie and B. M. Kraamer as Administrative Manager and Master of M.V. Carbay, respectively, and its operator Wallem Philippines, pursuant to Article 2180 of the Civil Code. In his complaint, private respondent alleged that while M.V. Carbay was dry-docked

in Aichi, Japan, he was attacked by his co-worker, an alleged protégé of B.M. Kraamer.

"Private respondent alleged that without investigation, B.M. Kraamer summarily dismissed him without paying his salary and thereafter compelled to take the train from Aichi to Yokohama and therefrom to Manila by Japan Airlines, incurring expenses therefor in the amount of $320.00. This incident was followed by a letter of Kenneth McKenzie to the Commandant of the Philippine Coast Guard asking that private respondent be refused clearance for future employment. Private respondent added that it was only on October 21, 1976 that the Philippine Coast Guard issued the clearance.

"Private respondent in his complaint asked that judgment be rendered in his favor by:

> 'Ordering the defendants jointly and severally to pay unto the plaintiff: a) P2,240 as reimbursement for his transportation expenses from Aichi, Japan to Yokohama Japan, thence, to Manila; b) P1,000.00 as actual damages for reasonable attorney's fees he incurred in the case against him with the Philippine Coast Guard; c) P15,390.00 as loss of his earning capacity for six (6) months starting from April 28, 1976 until he was finally issued the much needed 'clearance' by the Philippine Coast Guard; d) P5,000.00 as reasonable attorney's fees in this particular instance; e) Moral damages in an amount as this Honorable Court may award unto him; and f) costs of suit.' (p. 18, rollo)

"On November 22, 1976, petitioners filed a motion to dismiss for lack of jurisdiction and

alleged that the National Seamen's Board has the exclusive jurisdiction over cases in connection with the employment of Filipino Seamen on board vessels engaged in overseas trade (Sec. 12, Rule V, Implementing Rules and Regulations of the Labor Code).

"On July 6, 1978, respondent judge denied petitioners' motion to dismiss. Petitioners moved to reconsider but the same was denied on August 7, 1978.

"Hence, this appeal on a pure question of law.

"The sole issue is whether the court *a quo* has jurisdiction over this case.

"We are not persuaded by petitioners' argument that the National Seamen's Board has jurisdiction. A perusal of private respondent's complaint reveals his clear intention to seek and claim protection under the Civil Code and not under the Labor Code. We note that the items demanded are not labor benefits such as wages, overtime or separation pay, but are items claimed as natural consequences of such dismissal. (*Singapore Airlines Ltd. vs. Pano*, No. L-47739, June 22, 1983, 122 SCRA 671) Private respondent's complaint is denominated as 'damages' as a consequence of his alleged summary dismissal by petitioners. Moreover, private respondent in his opposition to petitioner's motion to dismiss, cites Articles 2197, 2199, 2200, 2219 and adds the relevant articles on Human Relations; Articles 19, 21, 24, and 32 to support his claim for damages.

"The *Quisaba vs. Sta. Ines Melale Veneer and Plywood, Inc.* case (No. L-38088, August 30, 1974,

> 58 SCRA 771) finds relevance to the case at bar. In that case we said: 'Although the acts complained of seemingly appear to constitute 'matters involving employee-employer' relations as Quisaba's dismissal was severance of a pre-existing employee-employer relations, his complaint is grounded not on his back wages, but on the manner of his dismissal and the consequent effects of such dismissal.'
>
> "Thus, gleaned from private respondent's complaint, this case is clearly within the purview of Civil Law. Consequently, the regular court a quo has jurisdiction and not the National Seamen's Board.
>
> "Accordingly, the Court Resolved to AFFIRM the assailed order of public respondent judge dated July 6, 1978, denying petitioner's motion to dismiss. The case is ordered REMANDED to the Regional Trial Court of Manila for further proceedings."

As a matter of fact, the POEA has lost jurisdiction over all such money claims and/or claims for contractual benefits of any nature, involving an employer-employee relationship as discussed by our Supreme Court in *Javier V. Court of Appeals,* 214 SCRA 572 (1992). Upon the passage of the Migrant Workers Act, money claims are now cognizable exclusively by the labor arbiter of the National Labor Relations Commission (NLRC):

> "Sec. 10 Money Claims – Notwithstanding any provision of law to the contrary, the Labor Arbiter of the National Labor Relations Commission (NLRC) shall have the original and exclusive jurisdiction to hear and decide, with ninety (90) calendar days after the filing of the

> complaint, the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino Workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages. x x x"

On March 20, 1995, after a Filipino domestic helper Flor Contemplacion was executed in Singapore for the alleged killing of another Filipino, former President Fidel V. Ramos, promulgated Executive Order No. 231 creating a Presidential Fact-Finding and Policy Advisory Commission on the Protection of Overseas Filipinos, a copy of which is attached hereto as Annex "D". President Ramos appointed Justice Emilio A. Gancayco as Chairman of the Commission and six other members coming from different sectors of society under Memorandum Order No. 271 of March 21, 1995, a copy of which is attached as Annex "E". The Commission had since been known as the Gancayco Commission.

The Commission's mandate was not only to determine the circumstances that led to the execution of Flor Contemplacion but also to conduct a fact finding investigation of the plight of the Filipino overseas workers (OCWs) and to recommend measures that need to be undertaken by the executive branch and/or Congress. Among the findings of the Gancayco Commission is that the POEA did not effectively perform its task, of adjudicating the money claims of OCWs arising from their employment contracts. It was thus recommended, among other changes, that jurisdiction over said claims be transferred from the POEA to the labor arbiters of the NLRC. Hence, this transfer of jurisdiction is provided for in the

Migrant Workers Act, many provisions of which are based on the recommendations of the Gancayco Commission.

Under Philippine law, where courts have concurrent jurisdiction, the court first taking cognizance acquires jurisdiction to the exclusion of all other courts, foreign or domestic. This principle applies directly in cases such as *Lejano* due to the fact that the seafarer has or had instituted suit before a U.S. court. In such a case, the Philippine courts do not have subject matter jurisdiction over the seafarer's case and the Philippine courts may be compelled to decline jurisdiction over the claims. The conclusion made by the Louisiana appellate courts that Philippine courts could or would accept jurisdiction over cases which had been originally filed before Louisiana or U.S. courts is, therefore, incorrect.

Although the Labor Arbiters of the National Labor Relations Commission of the Philippines have exclusive jurisdiction over the money claims arising from employment contracts, such jurisdiction may be exercised only within the territorial jurisdiction of the Philippines.

Similarly, the U.S. courts have exclusive jurisdiction over such money claims and claims arising from tortuous act committed within their territorial jurisdiction or where a claim has been first instituted before a U.S. court which has acquired jurisdiction over the subject matter and the defendants. Thus, on the assumption that the Philippine courts, other foreign courts and the Louisiana court(s) have concurrent jurisdiction over the tort claims of a Filipino seafarer, it is a well-settled rule that the court

first taking cognizance of the case does so to the exclusion of all other courts, foreign or domestic. The same rule applies even on the extreme assumption that the labor arbiters would also have jurisdiction over some claims raised in a particular case. Thus, in the words of our Supreme Court in the case of *Laquian V. Baltazar*, 31 SCRA 552 (1970).

> "Even in cases of concurrent jurisdiction, it is also axiomatic that the court first acquiring jurisdiction excludes the other courts. (citing *Grafton v. U.S.*, 11 Phil. 761, 791; *Valdez V. Lucero*, 76 Phil. 356; *Braca v. Tan*, 84 Phil. 582; *PP. v. Livard*, 94 Phil. 771; *Lumpay V. Hon. Moscojo*, 105 Phil. 968, 972-72; *Alunajen V. Valera*, 107 Phil. 224, 145)".

As a matter of fact, the Migrant Workers Act contemplates that "migrant workers", such as Filipino seafarers, may elect to file their claim in a foreign country even for those money claims arising from the employer-employee relationship or arising from tort or a delict. Under Section 24 of the act (Annex "D"), the position of a Legal Assistant for Migrant Workers Affairs was created under the Departure of Foreign Affairs which "shall be primarily responsible for the provision and over all coordination of all legal assistance to be provided to Philippine migrant workers as well as overseas Filipinos in distress." A legal assistance fund in the amount of P100 million was set aside for this purpose. The purpose of the fund was to assist Filipino workers in filing their claims before foreign courts of competent jurisdiction.

Again, this statutory provision was based on the findings and recommendations of the Gancayco Commission. The Commission found that most overseas workers had not been able to successfully enforce or recover their money claims or other complaints against their foreign employers through the POEA or the Philippine courts, and that the solution to this problem was to assist the workers in filing their claims or complaints in the appropriate forum in the country where the money claim arose or the tortuous act was committed or in the case of maritime cases wherever jurisdiction over the defendant could be obtained. The Commission also recognized that one of the many insurmountable difficulties faced by the Filipino seafarer in attempting to successfully prosecute a claim against a foreign employer or shipowner before the civil courts of the Philippine is caused by the limitation on the exercise of jurisdiction over non-resident defendants by Philippine courts. Philippine courts lack the authority to compel non-resident defendants and witnesses to appear before them and Philippines law does not recognize the principle of extra-territorial service of process or application of Philippine law. A Filipino seafarer who seeks to recover tort damages from a non-resident employer or shipowner must, therefore, bring his claim before the courts of a foreign country where the employer may be served with judicial process under the laws of the forum or where the shipowner's vessel may be seized through judicial process.

The Gancayco Commission also found that our Philippine embassies abroad failed to extend adequate legal assistance to many OCWs who desire to file their complaints against their employer or to defend themselves

against suits filed by their employers or other parties. Hence, the creation of this legal mechanism under the Migrant Workers Act, whereby all Philippine embassies or consulates abroad can now extend free legal assistance to Filipino OCWs in distress.

From the foregoing, it is clear that while under Section 10 of the Act, the Labor Arbiters of the National Labor Relations Commission have (like the POEA before) the original and exclusive jurisdiction within the Philippines over x x x" claims arising out of an employer-employee relationship or by virtue of law or contracts involving Filipino workers for overseas employment including claims for actual, moral, exemplary and other forms of damages," even for purposes of argument that it cover claims for damages arising from tortuous acts, the Philippine laws recognize the right of the overseas workers to file such claim or complaint against their employers or other person other person or entity, in either the country where the seafarer suffered the injury, or wherever the seafarer can obtain jurisdiction over the employer or shipowner.

Finally, for this court's review, the ruling of the Federal District Court for the Southern District of New York in the case titled *Leonardo A. Cuizon v. Kedma, Ltd., Joshua Shipping Ltd.*, 96 civ. 0229 (SS) (Jan. 29, 1997) (attached hereto as Exhibit F) correctly expresses Philippine law in that:

> (a) Under Admiralty law it is abundantly clear that a seaman's contract is the shipping article the seaman signs upon entering the vessel. It is not the POEA contract invoked by the defendants. The said seaman's shipping article

was signed in Mexico and not in the Philippines. Thus, it is this shipping article contract that controls, which does not contain a forum selection clause, not the POEA contract.

(b) A reading of the forum selection clause of the POEA contract limits the same to "claims, complaints or controversies relative to the implementation and interpretation of this overseas employer contract. Plaintiff's claim is a claim in tort, not a claim relative to the implementation or interpretation of POEA contract nor the shipping article contract.

(c) The POEA employment contract is a contract of adhesion, a fact which the Philippines Supreme court has recognized negates the effect of an even otherwise valid and enforceable forum selection clause.

(d) The Philippine courts have expressly allowed plaintiff to seek remedy in the United States courts for tort committed against Philippines signatories of POEA contracts. This is shown not only by the decisions of the Supreme Court already referred to by the experts Messrs. Alampay and Balane but most recently by the creation of the above discussed office of free legal assistance for distressed Filipinos abroad. (Section 34 of the Republic Act No. 8042, Annex "B") Section 13 thereof also reiterates the need for free legal assistance to be extended to migrant workers abroad (supra).

(e) The affidavits of Messrs. Alampay and Balane opining that Philippine law does not recognize the validity of forum selection clauses in general since such clauses would operate to unlawfully deprived [sic] the courts of jurisdiction over the case and the parties when such

jurisdiction were otherwise lawful and proper is a correct expression of Philippine law and jurisprudence.

(f) Messrs. Alampay and Balane correctly stated in their affidavit that the Philippine courts have no available compulsory process to compel non-resident defendants and/or witnesses to appear before them no [sic] do they have the ability to enforce awards rendered against non-resident defendants who do not have property in the Philippines. The *Cuizon* court aptly found that the Philippines, as an alternative forum, cannot assure the plaintiff will receive an adequate remedy for his claim. This holding is confirmed by the findings of the Gancayco Commission.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Court affirm the decisions of the trial court and appellate court in this case.

Makati City, October 21, 1998.

Respectfully submitted:

/s/ Ricardo P. Galvez
RICARDO P. GALVEZ
Solicitor General
IBP No. 463184, Jan. 7, 1998

/s/ Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
Assistant Solicitor General
O.R. 1411 (Lifetime Membership)

/s/ Romeo R. Ramolete
ROMEO R. RAMOLETE
Solicitor
IBP No. 365312, 1-25-94

Republic of the Philippines
Office of the Solicitor General
Amorsolo St., Makati City, Philippines

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the above and foregoing Amicus Curiae Brief has been this day served upon counsel of record by Federal Express Int'l Air Way bill No. 400-7091 6576 and 400-7091 6565 and properly addressed.

Makati City, Philippines, this 26th day of October, 1998.

/s/ Ricardo P. Galvez
RICARDO P. GALVEZ
Solicitor General

/s/ Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
Assistant Solicitor General

/s/ Romeo R. Ramolete
ROMEO R. RAMOLETE
Solicitor

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-719 DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.

FILED: Nov. 15, 1994 /s/ Merlene M. B. Cornin
DEPUTY CLERK

JUDGMENT ON EXCEPTIONS AND MOTIONS

This mater [sic] was called for hearing on November 8, 1994. Before the Court are various Exceptions and motions filed by Defendants Smedvig Tankships, Ltd. et al (hereinafter referred to as "Smedvig"). After considering the written memoranda filed by the parties, the affidavits and evidence submitted herewith and the argument of counsel, the Court has made the following rulings.

Concerning the exceptions and motions for dismissal filed by Defendant Smedvig, the Court rules as follows:

Defendant Smedvig's exception of forum non conveniens is hereby denied;

Defendant Smedvig's exception or motion to dismiss based upon a forum selection clause is denied;

Defendant Smedvig's exceptions of no cause of action and no right of action are denied. The Court, having considered the Lauritzen-Rhoditis factors to determine

the applicable choice of law, finds that those factors predominate in favor of this Court applying the law of this country and of this State to this Plaintiff's claims and there is no strong indication that Filipino law or Norwegian law should be applied in this factual situation; and

The Court further holds that there is subject matter jurisdiction over this action.

Before this Court is also a motion for protective order filed by Amoco Corporation. This motion is denied as moot, in light of the stipulation by the Plaintiffs withdrawing the requested discovery which was the subject of the motion for protective order;

Finally, Plaintiff has moved this Court for an order compelling responses from Defendant Smedvig for outstanding discovery. This Motion to Compel is hereby continued without date. Counsel for Plaintiff shall confer with counsel for Defendant Smedvig to attempt to resolve any objections to the requested discovery. If the parties cannot amicably resolve this discovery dispute, then either party may reset the Motion to Compel for hearing.

Thus rendered on November 8, 1994 in open court.

Judgment signed in chambers at Pointe a la Hache, Louisiana, on this 15th day of November, 1994.

/s/ Illegible
JUDGE

A TRUE COPY

/s/ Merlene M. B. Cornin
Dy. Clerk of Court

25th JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

CASE NO. 38-719

DIVISION "B"

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL
AMOCO CORPORATION

(EXCEPTIONS AND MOTIONS)

Testimony and Notes of Evidence taken before the HONORABLE WILLIAM A. ROE, Judge presiding, on Tuesday, November 8, 1994.

APPEARANCES:

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REPORTED BY:

PETER P. BORRELLO, JR.,
Official Court Reporter

THE COURT:

* * *

Those leave the other issues to be looked at. And one is the choice of law and Barcelona and Prado's and the other cases allow me to look at Lauritzen and Hellenic Lines and factors to determine whether or not under a choice of law analysis this would be a proper forum. And I agree whole-heartedly with the proposition that the factors, the eight factors set forth in those cases do not have equal weight. And in viewing those factors ther [sic] terms of the factual scenario that has been presented in this case, I find that they predominate in favor of this Court applying the law of this country and of this state to this Plaintiff's claims and that there is no strong indication that Filipino law or Norwegian law should be applied in this factual situation.

* * *

Now, in the situation – the burden – the road-block presented by Barcelona and Prado to this Court hearing this case, if in fact those cases are still valid is the Forum Selection Clause. Now, let's assume that Barcelona and Prado are still the law. Under a Forum Selection Clause, Prado and Barcelona would say that the clause in this situation should be adhered to on its face and that the Philippines should be the proper place for this Plaintiff to litigate his claims, however, Barcelona and Prado would

allow me to review the situation in terms of the jurisprudence represented by "BRENNAN VERSUS ZUPATO," for instance and to determine whether or not a trial in a contractual forum and in this case, the Philippines, would be so difficult or inconvenient for the Plaintiff that he would, for all practical purposes be deprived of his day in court. In Barcelona and Prado, the situation was such that it would almost have been ludicrous to suggest that the case should be litigated in this court because no one was here. There was absolutely no connection with this forum or this country so as to allow litigation in this court. I find that the factual situation in this matter is completely reversed. It would be absolutely factually ridiculous to suggest that either party, any party, Defendants or Plaintiff to require them to litigate in the Philippines would be unwarranted under the factual situation presented. Because of the peculiar situation presented by the Plaintiff's physical condition, the Court finds that it would be in fact gravely difficult and inconvenient for the Plaintiff to be required to litigate in the Philippines and that he would be for all practical purposes deprived of his day in court if required to do so. Now, that is assuming that Prado and Barcelona is not distinguishable or that they are still valid rules of law. I am particularly intrigued by the fact that Barcelona was a contract case and that this is a personal injury case and, therefore, I think that there are significant distinctions to be drawn from that.

I am also intrigued by the suggestion not made to me in the Barcelona case nor argued to the 4th Circuit Court of Appeals that the Forum Selection Clause is used by the Filipino tribunal as a procedural aspect of the Filipino

law, rather than as a matter of substantive law of that forum. It is quite possible that on that basis the Court, even if a factual situation would command respect for the Forum Selection Clause in this seaman's contract, it is very possible that the Court would ignore that Forum Selection Clause as the procedural law of the country in the Philippines, the Republic of the Philippines or whatever it may be and would instead determine that the substantive law of this state and of this country would dictate that this is the proper Forum Tribunal for this Plaintiff to litigate his claims.

Therefore, the Court will deny the Exceptions in this matter, specifically ruling that Forum Non-Conveniens is not applicable to this situation and it is rejected and that under the Forum Selection Clause Analysis that the Plaintiff does state a cause of action and does have a right of action to litigate his claims in this country.

The Court specifically rules that there is subject matter jurisdiction over this action based on the analysis that the Court has just made.

* * *

NO. 95-CA-0629

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

NESTOR ABDUAN, [sic] AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

versus

SMEDVIG TANKSHIPS, LTD., ET AL

In Re: SMEDVIG TANKSHIPS, LTD, ET AL

Applying for: SUPERVISORY WRITS

Directed to: HONORABLE WILLIAM A. ROE, JUDGE, 25th JUDICIAL DISTRICT COURT, PLAQUEMINES PARISH DIVISION "B", C.D.C. #38-719

STAY ORDER LIFTED; WRIT APPLICATION DENIED

(Filed Jul. 28, 1995)

Relator's application for supervisory writs is denied.

The trial court made a factual finding in light of *Bremen v. Zapata* that distinguished the case at bar from the situation in *Prado v. Sloman Neptun Schiffahrts A.G.*, 611 So.2d 691 (La. App. 4th Cir. 1992) *cert. denied*, 613 So.2d 986 (La. 1993) and *Barcelona v. Sea Victory Marine, Inc.*, 619 So.2d 741 (La. App. 4th Cir. 1993). We cannot say that he abused his discretion so as to require us to exercise our supervisory jurisdiction. Relator has an adequate remedy on appeal.

The Order of May 12, 1995, staying all proceedings is rescinded, and the stay is lifted.

New Orleans, Louisiana this 28th day of July, 1995.

/s/ Illegible
JUDGE PATRICIA RIVET MURRAY

/s/ Illegible
JUDGE JOAN BERNARD ARMSTRONG

LANDRIEU, J. Dissents with reasons.

I would maintain the stay order and grant the realtor's application for supervisory writs. *See Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741, 743 (La. 4th Cir. 1993); *Prado v. Sloman Neptun Schiffahrts A.G.*, 611 So.2d 691 (La. App. 4th Cir. 1993).

MOTION FILED

MAY 17, 1999

(3)

No. 98-1673

IN THE

Supreme Court of the United States

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

Petitioners,

v.

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

MOTION OF NORWEGIAN SHIPOWNERS' ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Norwegian Shipowner's Association respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petitioner's application for writ of certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The Norwegian Shipowners' Association is a trade group that represents 192 Shipowners operating 730 vessels on trade routes throughout the world. Over 48,000 foreign seamen are employed on vessels registered with the Association. A chief function of the Association is to negotiate wages and terms for employment contracts through collective bargaining agreements between shipowner members and the various labor organizations and governmental entities controlling the employment of these foreign seamen.

The collective bargaining agreement and associated employment contracts at issue in this case were the product of extensive negotiation between various Philippine and Norwegian interests, including the Association. The Association was responsible for drafting the collective bargaining agreement. Similar agreements exist with Polish, Russian, Indonesian, Pakistani, Central and South American, and Chinese labor interests. The venue and choice of law provisions to be included in the individual employment contracts played important roles in those negotiations.

Association member vessels routinely visit ports throughout the world. By establishing in advance what laws will govern the employment relationship and where disputes arising pursuant to that relationship may be heard, choice of law provisions and forum selection clauses in seamen employment contracts put all parties on notice as to their respective rights and responsibilities. Disregarding forum selection clauses and haphazardly subjecting shipowners to jurisdiction wherever their vessels may be found on matters entirely unrelated to the vessel's presence in those locations infuses a great deal of legal uncertainty into the shipping industry and places an unnecessary burden on international commerce. The decision of the Louisiana Fourth Circuit Court of Appeals, which tests the enforceability of a forum selection clause on the degree to which the individual seaman was privy to the negotiations which resulted in its inclusion in a standard employment contract instead of the fairness and reasonableness of the terms of the provision itself, abrogates the usefulness of these provisions.

Because the Association played a leading role in the negotiations leading to the development of the employment contracts at issue in this case, it is able to shed light on the importance which forum selection clauses played in those negotiations, which highlights the importance of these provisions to the shipping industry and its associated labor interests. Because Association member vessels are extensively engaged in international commerce and routinely visit ports around the world, the Association is positioned to shed light on the negative effect the ruling of the Louisiana Fourth Circuit Court of Appeals has on the international shipping trade.

Respectfully submitted,

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INTEREST OF THE NORWEGIAN SHIPOWNER'S ASSOCIATION[1]

The Norwegian Shipowners' Association is a trade group that represents 192 Shipowners operating 730 vessels on trade routes throughout the world. Over 48,000 foreign seamen are employed on vessels registered with the Association. A chief function of the Association is to negotiate wages and terms for employment contracts through collective bargaining agreements between shipowner members and the various labor organizations and governmental entities controlling the employment of these foreign seamen. The collective bargaining agreement and associated employment contracts at issue in this case were the product of extensive negotiation between various Philippine and Norwegian interests, including the Association. Similar agreements exist with Polish, Russian, Indonesian, Pakistani, Central and South American, and Chinese labor interests. The venue and choice of law provisions to be included in the individual employment contracts played important roles in those negotiations.

Association member vessels routinely visit ports throughout the world. By establishing in advance what laws will govern the employment relationship and where disputes arising pursuant to that relationship may be heard, choice of law provisions and forum selection clauses in seamen employment contracts put all parties on notice as to their respective rights and responsibilities. Disregarding forum

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1. No counsel for either party has authored this brief in whole or in part. No party other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. This statement is made in compliance with Supreme Court Rule 37(6).

selection clauses and haphazardly subjecting shipowners to jurisdiction wherever their vessels may be found on matters entirely unrelated to the vessel's presence in those locations infuses a great deal of legal uncertainty into the shipping industry and places an unnecessary burden on international commerce. The decision of the Louisiana Fourth Circuit Court of Appeals, which tests the enforceability of a forum selection clause on the degree to which the individual seaman was privy to the negotiations which resulted in its inclusion in a standard employment contract instead of the fairness and reasonableness of the terms of the provision itself, abrogates the usefulness of these provisions.

SUMMARY OF THE ARGUMENT

Enforceable forum selection clauses play a vital role in international maritime commerce. These contractual mechanisms reduce the array of jurisdictions and laws to which a shipowner would otherwise be subjected on a routine basis. By clearly establishing where parties may sue to assert their rights, these clauses reduce legal expenses, protect litigants' rights, and conserve judicial resources. Both the shipowners and seamen benefit from the resultant cost savings and increased certainty. By declaring that a forum selection clause was invalid because its inclusion in an employment contract had not been negotiated for by an individual seaman, and was therefore "overreaching, unreasonable, and unjust," the Louisiana Fourth Circuit's decision conflicts with this Court's holding in *Carnival Cruise Lines v. Shute*, 499 U.S. 586 (1991), and the Fifth Circuit Court of Appeals' decision in *Marinechance Shipping, Ltd. v. Sebastion*, 143 F.3d 216 (5th Cir. 1998).

ARGUMENT

1.

FORUM SELECTION CLAUSES ARE AN INDISPENSABLE ELEMENT OF MODERN INTERNATIONAL MARITIME COMMERCE.

Three overarching policy reasons have led courts uniformly to recognize that forum selection clauses are an indispensable element of modern international maritime commerce and to enforce these clauses as a matter of course. First, in the absence of such contractual mechanisms, the nature of international maritime commerce would subject shippers to an endless variety of foreign fora and laws according to the vagaries of chance rather than the particular jurisdiction's actual interest in resolution of the dispute. *Carnival Cruise Lines v. Shute*, 499 U.S. 586, 593-94 (1991). Second, establishing in advance where disputes may be tried dispels any confusion as to where and under what laws the parties may seek to enforce their rights. This in turn lessens the threat that a litigant's rights may prescribe or otherwise be lost before an appropriate forum is found, and conserves judicial resources. *Id.* Finally, both parties to the contract stand to benefit from the anticipated resultant cost savings. *Id.*

For these reasons, the seminal decision *The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 15 (1972), held that forum selection clauses are presumed to be valid and enforceable in admiralty. In *The Bremen*, the Court enforced a forum selection clause contained in a contract for the towage of an offshore platform from the Mediterranean Sea to the Gulf of Mexico. *Id.* at 2. The Court held that a forum selection

clause should only be disregarded on a clear showing "that trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Id.* at 18.

The Court further clarified the favored status of these clauses in *Carnival Cruise Lines v. Shute*. *Shute* concerned enforcement of a forum selection clause printed on the back of a passenger's ticket. *Shute*, 499 U.S. at 587. *Shute* expanded the enforceability of these provisions to encompass contracts between corporations and relatively unsophisticated individuals. *Id.* at 593. The passenger had no bargaining power and had not negotiated the terms of her ticket. *Id.* The passenger's option was either to accept the provision or not take the cruise. *Id.* at 595. Nevertheless, the clause was not unfair or unjust and the passenger as well as the shipowner derived certain benefits from its inclusion. *Id.* at 593-94. The Court emphasized that a litigant who seeks to avoid a forum selection clause bears a "heavy burden of proof." *Id.* at 595.

Following *Shute*, the United State Fifth Circuit Court of Appeals considered the same issues and enforced forum selection clauses in the context of employment contracts for foreign seamen. *Marinechance Shipping, Ltd. v. Sebastion*, 143 F.3d 216 (5th Cir. 1998). The Fifth Circuit noticed striking similarities between the employment contracts executed by the seamen in the case before it and the contract for carriage at issue in *Shute*. *Id.* at 221. The court held that the forum selection clauses in the employment contracts were fair and reasonable and that the seamen as well as the shipowner benefited from their

inclusion. *Id.* Ironically, the very same employment contracts which *Marinechance* held valid and enforceable have been abrogated by the decision below.

II.

WITHOUT ENFORCEABLE FORUM SELECTION CLAUSES, SHIPPERS WOULD BE ROUTINELY SUBJECT TO SUIT IN A BEWILDERING ARRAY OF FOREIGN JURISDICTIONS.

Without enforceable forum selection clauses, shipowners would be subject to suit in a bewildering array of foreign fora, all applying different laws and remedies. "Ocean-going vessels travel through many jurisdictions, and could become subject to the laws of a particular jurisdiction based solely upon the fortuitous event of an accident." *Marinechance*, 143 F.3d at 220. As the Court stated in *The Bremen*:

> Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where [the vessel or shipowner] happen to be found. The elimination of all such uncertainties by agreeing in advance is an indispensable element in international trade, commerce, and contracting.

The Bremen, 407 U.S. at 13-14. The Court went on to state that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be put aside." *Id.* at 15.

The present case is typical of the problem facing shipowners. The plaintiff, a Philippine citizen, was injured on a Norwegian vessel on a voyage that began in Cayos Arcus, Mexico, and ended in Ft. Mifflin, Pennsylvania, in an accident in international waters off the coast of Cuba. The plaintiff was evacuated to Key West for treatment. Thus, aspects of the voyage and accident involved contacts with Florida, Pennsylvania, Mexico, Norway, and the Philippines. Yet none of even those disparate locations ultimately served as the forum for the dispute. The plaintiff sued the shipowner in Point-a-la-Hache, Louisiana, a place whose only connection to the whole affair was that another unrelated vessel owned by the shipowner happened by chance to be subject to non-resident attachment in Plaquemines Parish.

As *The Bremen* and *Shute* recognize, this is precisely the situation that forum selection clauses legitimately seek to avoid. A shipowner has been subjected to trial in a remote jurisdiction whose sole connection to the dispute is that an unrelated vessel owned by the shipowner happened to be found there. As stated at the outset, Association member vessels routinely visit ports throughout the world. Disregarding forum selection clauses and haphazardly subjecting shipowners to jurisdiction wherever their vessels may be found on matters entirely unrelated to the vessel's presence in those locations infuses a great deal of legal uncertainty into the shipping industry and places a tremendous burden on international commerce.

III.

BY ALLOWING PARTIES TO ESTABLISH EX ANTE REASONABLE VENUES FOR RESOLUTIONS OF DISPUTES, FORUM SELECTION CLAUSES REDUCE LEGAL UNCERTAINTIES INHERENT TO INTERNATIONAL TRADE.

Forum selection clauses remove uncertainty concerning the resolution of disputes. They delineate where seamen may sue to enforce their rights and where shipowners may be subject to suit. The resulting increased certainty inures to the benefit of both shipowners and seamen. "The selection of a forum in advance reduces the vessel owner's exposure to suits in forums all over the world. Furthermore, it informs the seamen of where their causes of action may be maintained." *Marinechance*, 143 F.3d at 221. Additionally, by establishing in advance the proper venue for litigation, forum selection clauses act to preserve litigants' rights, reduce legal expenses, and conserve judicial resources. Forum selection clauses have "the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing the litigants time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." *Shute*, 499 U.S. at 593-94.

IV.

THE VENUE PROVISIONS AT ISSUE IN THIS CASE WERE THE PRODUCT OF EXTENSIVE NEGOTIATION WITH PHILIPPINE GOVERNMENT AND LABOR ORGANIZATIONS.

The forum selection provisions at issue in this case were the product of extensive negotiations. They should not be lightly disregarded. These negotiations were conducted between the Norwegian Shipowners' Association, Norwegian labor unions, and The Associated Marine Officers' and Seamen's Union of the Philippines ("AMOSUP"). AMOSUP is a Philippine seamen's labor organization. The resulting collective bargaining agreement was submitted to and approved by the Philippine Overseas Employment Administration ("POEA"). The POEA is the Philippine government agency which controls the foreign employment of Philippine citizens.[2]

During these negotiations, Norwegian shipowners and labor interests took the position that Norwegian laws should control and that Norway should be the designated forum for any disputes arising out of the employment. Norwegian law allows a seaman to sue a shipowner either in the seaman's home country or in Norway. *Norwegian International Ship Register Act*, § 6. [Appendix A] Additionally, if in a foreign port, a seaman may bring his

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2. As Judge Wisdom noted in *Marinechance*, "[t]he effect of POEA intervention is to shift the balance of power slightly in favor of the employee in much the same way that a labor union or legislative enactment of minimum work standards increases the level of protection for employees in the United States." *Marinechance*, 143 F.3d at 221 n.25.

action before the local Norwegian consulate. *Norwegian Seamen's Act*, § 50. [Appendix B] The consulate has the authority to enter a binding decision subject to appeal to a court of competent jurisdiction. *Id.* In no event may the suit be brought before foreign authorities. *Id.* [3]

The Philippine interests, however, were insistent that venue should be designated in the Philippines. After considerable negotiation it was concluded that seamen would be allowed to sue in either venue. It is worth noting that the POEA reviews and approves each contract for overseas employment to ensure compliance with this venue requirement. *Marinechance*, 143 F.3d at 219.

Additionally, the negotiations for the inclusion of these forum selection provisions were closely tied to the provisions concerning the wages and benefits to be provided the seamen, including cadets such as Mr. Valdez. Restricting the number of venues in which a shipowner can be sued for matters arising out of a seaman's employment is thus an integral part of any employment bargain. The Fourth Circuit's decision that the forum selection provision in these employment contracts are not worthy of enforcement clashes with the Norwegian shipowners bargained-for right to a degree of certainty about where they can be sued by their employees.

The first collective bargaining agreement was executed in 1987. It has since been renegotiated every two years. The POEA has been consulted during each negotiation, and

3. Thus, in addition to the provisions of his employment contract, a seaman aboard a Norwegian vessel is limited under Norwegian law to bringing suit against his employer either in Norway or his home country.

has approved each subsequent agreement. The salient features of the agreement will soon be memorialized in a formal treaty between the Philippines and Norway. The treaty been approved by each country's respective ministries[4] and is expected to be reviewed by legislative authorities and signed shortly. The treaty contains the same venue requirements, now long honored by both countries, which the Louisiana Fourth Circuit Court of Appeals refuses to enforce. [Appendix C]

V.

BY PROVIDING PROPER VENUE IN EITHER THE PHILIPPINES OR NORWAY, THE FORUM SELECTION CLAUSES AT ISSUE IN THIS DISPUTE ARE INHERENTLY REASONABLE.

Finally, the forum selection clauses at issue here are inherently fair and reasonable. As stated earlier, these are the very same provisions which the Fifth Circuit enforced in *Marinechance*. Indeed, considering that a seaman's employment aboard an ocean-going ship will likely take the seaman to various locations around the globe, a forum selection provision which allows the seaman to sue the

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4. Participating in the negotiations were the Norwegian Ambassador to the Philippines and representatives from the Norwegian Ministry of Trade and Industry, the Norwegian Shipowners Association, the Philippine Maritime Industry Authority, the Philippine Department of Foreign Affairs, the Philippine Shippers' Bureau, the Philippine National Economic Development Authority, the POEA, the Philippine Department of Transportation and Communications, the Philippine Ports Authority, the Philippine Bureau of Customs, and the Philippine Bureau of Immigration.

shipowner in the seaman's home country is *a fortiori* reasonable. It gives the seaman the right to have any dispute concerning his employment adjudicated in a friendly forum. Although such forum selection clauses may require that seamen forego the opportunity to forum shop, the question of whether a higher verdict might be obtained elsewhere is simply not a basis for declining enforcement. The seaman exchanges his opportunity to forum shop at the outset for a guaranteed convenient and amenable forum as well as enhanced employment opportunities with increased benefits and wages that are substantially above the norm in the Philippines.

CONCLUSION

Amicus curiae respectfully submits that the Court should grant the writ and reverse the Louisiana Fourth Circuit Court of Appeal's decision, and affirm the validity and enforceability of forum selection in foreign seamen's employment contracts.

Respectfully submitted,

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APPENDIX A — NORWEGIAN INTERNATIONAL SHIP REGISTER ACT § 6

Chapter II. Special provisions relating to ships in the Norwegian International Ship Register

Section 6. Pay and working conditions

Terms of pay and employment and other working conditions on ships in this register are to be fixed in a collective wage agreement which expressly states that it applies to such service. A collective wage agreement which does not so state does not apply to service on ships in this register.

Collective wage agreements may be concluded with Norwegian or foreign trade unions.

The collective wage agreement mentioned in the first paragraph shall expressly state that the agreement is subject to Norwegian laws and Norwegian courts of law. The parties to the agreement may nevertheless deviate from the provisions in subsections 2 and 3 of Section 6 and Chapter 2-5 of Act no. 1 of 5 May 1927 relating to labour disputes, if the agreement instead of referring to Norwegian courts explicitly provides that disputes concerning the agreement shall be subject to the courts and procedural rules, including rules governing arbitration, in another country.

Individual contracts of engagement for service on ships in this register shall expressly state that the contract is subject to Norwegian laws and Norwegian courts, but that cases concerning the employee's service on the ship may be brought against the owner before a Norwegian court or before a court in the employee's country of residence.

APPENDIX B — NORWEGIAN SEAMEN'S ACT § 50

§ 50
Settlement of disputes between master and crew abroad

If, while the ship is in a foreign country, a dispute arises between the master and any of the crew regarding the settlement of wages, the ship service or the employment relationship in general, the case shall be referred to a Norwegian foreign service station. The dispute shall not be brought before foreign authorities. As regards lawsuits against the shipping company relating to compensation for occupational injuries, they may only be brought before a court of justice in Norway.

The foreign service station shall render its decision in the case, after hearing the statements of the parties.

The decision is binding on the parties, but may within 6 months be brought before the courts in Norway. Sections 153-158 of the Act of 13 August 1915 number 5 relating to the Courts of Justice shall apply correspondingly. Against a seaman who has no venue in Norway, proceedings may be brought in the judicial district where the ship is registered. The same shall apply when a case concerns two or more seaman with different venues.

If the decision relates to payment of a sum exceeding 10 percent of the basic amount in the Act relating to National Insurance and the decision is not accepted, the foreign service station may, where the circumstances render it desirable, order all or part of the amount to be deposited with the station. The sum deposited shall be sent to the authority designated by the King together with a copy of

the decision. The sum shall be paid out after the expiry of the six-month time limit referred to in the third paragraph or, if the case is taken to court, when the case has been determined by final judgement or has been discontinued without a judgement.

The King may issue regulations on the handling of cases under this section, including increasing or decreasing the value limit prescribed in the preceding paragraph. Limitations on the use of an authorized agent during the proceedings in accordance with § 12 of the Act of 10 February 1967 relating to general rules governing administrative proceedings, may also be made.

The King may decide by way of regulations that this § shall not be made applicable to certain cases.

APPENDIX C — AGREEMENT ON MARITIME TRANSPORT BETWEEN THE GOVERNMENT OF THE KINGDOM OF NORWAY AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES

Article XI

Rules on Labor Disputes

The terms of employment of a national of a Contracting Party serving as a crew member on a vessel of the other Contracting Party shall be stated in the contract of employment.

Any disputes or claims, including claims for torts arising from or related to the contract of employment or relations between a shipowner of a Contracting Party and a crew member of the other Contracting Party, including but not limited to wage claims, and claims for damages as a result of the illness, personal injury or death of a crewmember, shall be referred for determination and resolution solely to the exclusive jurisdiction of the competent Courts, Tribunals or Authorities, as the case may be, of the Contracting Party in which the vessel is registered or of the other Contracting Party where the complainant is a national. The Contracting Parties will provide the appropriate mechanisms for such cases to be heard when raised.